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Narrative Report to Law Reform Commission of Australia on Results of Field Trip to the Northern Territory Pursuant to the Reference on Customary Law

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Summary

This submission to the Law Review Commission of Australia (later the Australian Law Review Commission) makes recommendations regarding to what extent existing courts or Aboriginal communities themselves should be empowered to apply Aboriginal customary law and practices in the trial, punishment, and rehabilitation of Aboriginal offenders. The report is based on field interviews in six Aboriginal communities in the Northern Territory of Australia as well police, magistrates, solicitors, legal aid field officers, the Crown Solicitor of the Northern Territory; and community advisors and staff of the Department of Aboriginal Affairs. The report discusses the relationship between indigenous law and the western law system derived from the British common law system as one of legal pluralism — more than on legal process at work in the same environment at the same time — and draws comparisons between legal pluralism as it exists in Australia with the situation in Alaska.

Additional information

The Australian Law Reform Commission's inquiry into Aboriginal Customary Laws was conducted from 9 February 1977 to 12 June 1986. Its focus was on whether it would be desirable to apply, either in whole or in part, Aboriginal customary law to Aboriginal and Torres Strait Islander peoples — generally or in particular areas or to those living in tribal communities only.

The inquiry's findings were reported in:

Recognition of Aboriginal Customary Laws. ALRC Report 31. Australian Law Reform Commission, 11 Jun 1986.

NARRATIVE REPORT TO LAW REFORM COMMISSION OF AUSTRALIA ON RESULTS OF FIELD TRIP TO THE NORTHERN TERRITORY PURSUANT TO THE REFERENCE ON CUSTOMARY LAW

JUSTICE CENTER

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NARRATIVE REPORT TO LAW REFORM COMMISSION OF AUSTRALIA ON RESULTS OF FIELD TRIP TO THE NORTHERN TERRITORY PURSUANT TO THE REFERENCE ON CUSTOMARY LAW

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Narrative Report

Introduction

I was invited to spend five weeks in Australia in order to visit Aboriginal settlements in the Northern Territory[1] and offer practical advice regarding initiatives which might be taken in response to a Parliamentary reference to the Law Reform Commission of Australia to ascertain:

A. Whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in trial and punishment of Aborigines.

B. To what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and

C. Other related matter.

The Law Reform Commission had conducted extensive and lengthy field studies of Aboriginal customary law in Western Australia, Queensland and the Northern Territory.[2] It had also drawn upon several anthropologists, experts in Aboriginal culture and in legal anthropology, among them Nancy Williams, Diane Bell and W. Stanner.[3]

In addition, staff researchers had reviewed several extant experiments in integration of Aboriginal law ways and Australian law. Darwin Magistrate George Galvin employed clan representatives in Pt. Keats as lay assessors to advise him on sentencing of youthful offenders. Alice Magistrates Barrette and Towers consulted settlement councils for the same purpose at Papunya,

Yuendumu, Hermannsburg and Hooker Creek.

Magistrate Tom Pauling had consulted with the Garma Council, a traditional council, at Yirrkala and had been prepared to name clan heads as justices of the peace until advised against it by local leadership and by H. C. Coombs, a leading advocate of reform of Aboriginal policy.[4/]

Other reforms in the territorial delivery of justice services were underway during my visit. At the police level, the Northern Territory had embarked on an expansion of police presence into ex-government settlements and missions. A police aide program for Aboriginals had been designed and implemented.

Aboriginal Legal Aide had for about five years deployed Aboriginal field officers as interpreters and as investigators in Aboriginal communities.

At the supreme court level, new court decisions had articulated operating procedures for interrogation of Aboriginal prisoners which involved the use of a "prisoner's friend," a second Aboriginal person to interpret for the defendant and to put the defendant at ease.[5/]

Finally, several legislative reforms had some present or prospective impact on the issue addressed by the Law Reform Commission. First, public drunkenness and vagrancy statutes had been replaced in practice by protective custody, a provision which allowed police to take into short-term custody inebriated persons who in the opinion of the officer posed a danger to themselves or the community. Second, new territorial liquor legis-

lation allowed communities to ban liquor or to limit its use in the settlements to specific persons or to specific times and places. Finally, another piece of territorial legislation provided that community councils could make ordinances to further enforcement of territorial liquor laws.

Separate Native courts existed under the aegis of the Aboriginal Affairs Department of Queensland, courts not unlike law and order courts on many American Indian reservations. New Guinea had developed custom courts attractive to many European Australians because of their prior involvement in New Guinea.

Serving as a backdrop to ongoing experimentation, reform and research in the field are unresolved issues which have great bearing on domestic law and order and the role of custom and law in small settlements. Chief among these is the ultimate legal authority of rural Aboriginal groups over land occupied by them since prehistoric times. The issue of land rights is the one to which Aboriginal groups are addressing paramount attention. The relationship of this issue to law and order or disputing issues and the role of custom stems from the importance of being on one's own land to social ordering generally in traditional Aboriginal communities.

Therefore, it was necessary for me not only to formulate new proposals, but also to understand and evaluate current, projected and near-recent experiments already underway. It was also necessary for me to have some basic understanding of the land rights phenomenon.

Finally, and most importantly, it was necessary for me to learn something of the legal history of Aboriginals and the present day, daily experience of Aboriginals with law.

After preliminary discussions, I requested of Commissioner DeBelle that my field work focus upon an examination of the factors which result in the intervention of the Australian criminal investigation system and factors which result in prosecution together with a discussion of means whereby the interface between the Australian legal system and the Aboriginal legal system can be screened or brokered.

I chose this relatively narrower focus upon the interplay between custom and law and further narrowed my examination of the Australian legal process to what is termed the summary justice (non-felonious) level. This excluded from examination the role of the territorial supreme court because the Australian legal process is experienced more generally by Aborigines through the work of police and magistrates. Both normal and experimental activity by police and magistrates were considered.

The physical presence and daily decisions made by Australian police and magistrates establish the context in which reforms must be implemented. One cannot evaluate the actual or potential role of customary law outside of the context of real life experience with Western law, both present and historical experience.

From that experience, both positive and negative, emerges realistic assessments by Aboriginals as to the future role of customary law. From that same experience a researcher may predict

the probable response of legal bureaucracies to reforms articulated at the parliamentary level.

The Field Investigation and Its Results

Six Aboriginal communities were visited. These were Papunya, Areyonga and Haast Bluff near Alice Springs; Beswick and Banyilli near Katherine and Yirrkala near Nhulunbuy.

These communities were selected because they present a variety of size, history and, most important, their relationships with Western law. All of these communities differ from outstations, small groups of Aboriginals who have returned to the land and isolated themselves somewhat from problems in settlements and towns, and again from fringe camps situated on the margins of white Australian towns.

In each case, the settlements studied were within relatively easy or very easy driving distance from white towns. Put another way, access to towns by persons who choose to visit them is possible and movement of people between towns and settlements occurs with some frequency. So, inevitably, do settlement people experience Western law both in the town and in the settlement.

Resident police stations exist in Papunya, but not in Areyonga and Haast Bluff. The former is an ex-government reserve of about 700 people; the latter are smaller settlements of 200 and 150 respectively. Haast Bluff is a cattlestation.

Yirrkala people look to Nhulunbuy for police service, about 17 kilometers away. They also look to Nhulunbuy for town attractions, including liquor.

Beswick is 70 miles from Katherine and Banyilli is 30 miles from that highway town.[6/]

I had planned to visit other settlements designated by the Law Reform Commission. However, complications arose. Maningrida residents banned outside visitors during election week in the territory. A rain storm made the trip by either road or air to Yuendumu impossible.

I traveled to each settlement (with the exception of Yirrkala) in the company of an Aboriginal person who had long established relationships with the settlement.

The Relevance to the Reference on Customary Law of Western Legal Activity

The reference on customary law arose out of several distinct debates that related ultimately not only to customary law as it operates in isolation from the Western law system, but to the posture of Western law in settlements as it deals with occurrences of customary law and with new problems which threatened customary social organization.

Overview: The Context of Reform

In Australia, as in other countries whose legal systems owe much to British common law tradition, the ultimate relevance of indigenous law is being tested by the introduction of the modern law system.

The situation is one of legal pluralism. That is, more than one legal process is at work in the same environment at the same time.

What exists presently in Australia's outback is what legal scholar Marc Galanter terms a colonial legal situation:

> The colonial legal situation . . . stands midway between those systems where official law is reflective of and well integrated with, popular law because it has been precipitated out of that law (or because it has completely absorbed and digested local law); and those where it is reflective of [or] well integrated with folkways because no remote official law has ever differentiated itself institutionally from folk or popular law (1968:84).

The intentions of modern law systems with respect to custom vary among societies and within societies. The implantation of Soviet law in Muslim Central Asia is often cited for use of imposed modern law as an instrument of domination and manipulation "all in one direction"(Kidder, in Bruman and Harrell-Bond 1979: 292).

But even where, as in the case of the British in India, an attempt was made to employ judiciously local customs and religous laws to determine the outcome of cases, scholars have observed that customs and their meanings were <u>transformed</u> in the process.

As Kidder (1979:294) notes:

> Both systems disrupted indigenous culture. British attempts to preserve Indian customs actually transformed them into supports for new patterns of social domination . . .. Because customs and religious laws had never before been enforced by a "rationalized," "unified," record-keeping judiciary, they had operated as flexible guidelines for social control rather than as rigid laws
>
> Using custom as grounds for adjudicated decisions, the British lent support to caste-determined patterns of social, economic, and political dominance. Seeking clear definitions of local custom and law, administrators and judges came to rely on interpretations given them by Brahmins whose literacy and familiarity

> with ancient scripture gave them an authoritative image in the eyes of the British. Whoever could master the routines of court could thus gain advantage over those who had less mastery. The populace reacted to this situation by developing schemes to fool judges, bribe court officials, falsify documents and testimony, and infiltrate court positions so that "the law" could be manipulated from within. The pursuit of privilege became a court-centered preoccupation for millions of villagers who could not (or would not) rely any longer on indigenous processes.
>
> Thus the British, despite their stated intentions, actually altered the meanings of many customs, particularly those related to patterns of dominance. They reified customarily vague indigenous norms and tried to pin down the exact stratificational consequences of those norms.

As Kidder describes it, the process of "imposition of law" upon indigenous populations has in recent days been characterized in several ways. Anthropologist Paul Bohannon speaks of the selective transformation of custom into law as "double institutionalization" and Diamond describes the same process as "cannibalism of custom by law," (with) "law as a deliberate device of the ruling elite to absorb customary practices of subordinate groups and dissolve these autonomous groups so that they may serve the interests of the elite" (Kidder on Diamond, 299).

What has been overlooked until recently except by a minority of scholars (e.g., Galanter 1968 and Kidder 1979) is that the dynamics of integration of law and customary law depend principally upon interaction of powerful elements of both the dominant and indigenous societies.

Manipulation of law and custom occur on the part of both sides, legal agents and indigenous consumers. New forms of legal

process result from this exchange.

Marc Galanter emphasizes that traditional notions of legality and methods of change "persist at a sub-legal level- e.g. in the area of activities [in India] protected by the doctrine of 'caste autonomy', in the form of accepted deviance, and in arrangements to endeavor to ignore the law." Further, that the:

> [M]odern legal system may provide new possibilities for operating within traditional society. Official law can be used not only to evade traditional restrictions, but to enforce them . . .. Traditional society is not passively regulated by the modern system; it uses the system for its own ends. Traditional interests and grouping now find expression in litigation, in pressure-group activity and through voluntary organization (1968: 83).

Interaction in Australia

The field trip experience demonstrated many concrete instances of ongoing manipulation of the Western legal process in the "name of integration of Aboriginal custom" by agents of the territorial legal system. There were also examples of countermanipulation of the process by clients to the system.

Settlement police explained their patterns of arrests as being directed against "crimes against European culture." This meant empirical enforcement of laws against Aboriginals when they violated European codes of behavior prevalent in Australia and damaged or stole property of European settlers.[7/] Violence by Aboriginals against Aboriginals on the settlements was often excused in the name of cultural difference.[8/] The collaboration with elders by sentencing magistrates resulted in penalties imposed against offenders which would not have been imposed against

Europeans. Thus exile, public beatings and bush camps, fixtures of traditional customary law, came to be validated as sanctions of the Western legal process by police and magistrates.

In the mining town of Nhulunbuy, extra-legal arrangments were made with the Walkabout Hotel, with the blessing of the police and magistrates, to restrict the purchase and use of grog among Aboriginals to a public bar. The package store prohibited the sale of fortified wine to Aboriginals.[9/]

On the Aboriginal side of the equation, indigenous people have discovered that Western deviance on their part is readily explained as the product of intoxication.[10/] Persons have learned from experience that there will be little or no difference between the punishment meted out for nonviolent drunken behavior (protective custody) and more serious offenses (suspended sentences after serving time on estreated bail). They have learned that one can avoid (at least temporarily) the sentence imposed by a magistrate by failing to appear on a court date and, further, that promises to change one's behavior as a condition of a suspended sentence can be broken.

Where police or defense attorneys decide to stand by as individuals are chastised, beaten or speared, the immediate impact is to validate a sanction of Aboriginal law as a de facto matter whether or not that sanction is legitimated in Australia law. One can, of course, avoid a reaction by Australian law entirely by meting out traditional punishments in places isolated from Europeans.

Modes of interaction, manipulation and countermanipulation are already characteristic of the interplay of Western and Aboriginal law.

It appears then that whether or not reforms are generated by the customary law reference, the legal process that addresses Aboriginal persons will be redefined as it is implemented in the name of cultural sensitivity. Decisions will be made which are rationalized as being culturally appropriate by persons who may or may not be able to assess fully their cultural implications.

It should be expected, therefore, that reforms which flow from the customary law reference will also be manipulated by agents of Australian law (whoever they may be) and consumers of Australian law. It is important then to delineate reforms which appear more likely to be manipulated in ways constructive to both Aboriginal groups and individuals and to the larger territorial system. For this to occur, options available to Aboriginal individuals in the Western legal process should not be foreclosed in the name of cultural separatism or cultural difference.

Individual Aboriginals may choose to cast their lot and identify with tribal units or to pursue legal remedies available in the Western legal process to aggrieved minorities.

Because then custom and law interact through a decision making process, the reforms outlined below will focus on decision making, pockets of legal authority and new and old roles in the process rather than on formalization of customary norms. Options now available to participants in the territorial-customary legal

process will be expanded through these reforms; options will not be withdrawn or restricted.

Further, it is anticipated that the reforms will serve as a basis for further manipulation of the process by participants (manipulation which may be termed experimentation). At least as critical as any reform postulated is field experimentation and evaluation. An evaluation scheme should be part of any reform proposed to the Parliament or the territory.

Law reforms which attempt to relate law to custom are, if nothing else, full of surprises.

Should then further reform be generated? Given the history of failure of modern legal systems to incorporate customary process as living law without transforming its meaning in the process, is the mandate of the reference useful or feasible of accomplishment?

To answer these questions, one must consider the problem from a different perspective; what Edmond Cahn termed "a consumer's perspective." What do indigenous people seem to want from the law <u>processes</u> in their midst? The answers seem to be these:

1. Aboriginals want effective legal responses <u>from any quarter</u> that deal with drinking problems by adult males and petrol sniffing by juveniles, problems associated with ex-government and ex-mission settlements where residents now have relatively easy access to towns and motor vehicles. Although police and magistrate activity have increased in these settle-

ments, following the problems from the towns to the settlements, this police and magistrate activity has not successfully dealt with these problems.

2. Aboriginals appear to want to understand, collaborate and guide Australian legal activity as it deals with their own group's problems. Opportunities to collaborate have been limited.

3. New problems are destructive of both traditional social organization and social life within "new" Aboriginal communities as they now exist as rural Australian communities.

4. Western legal service, that is, Western policing, Western judging, Western lawgiving and Western correctional activity has, according to all participants in the system, lawgivers and consumers, failed to adequately treat problems associated with drinking.

5. Aboriginals desire appropriate responses by Western law to matters not easily interpreted or understood by Western legal agents. They desire to continue and expand their own approaches within the context of legal pluralism.

6. Finally, Western legal agents want to understand Aboriginal law and relate Western law to Aboriginal tradition.

What emerges then is neither a call for a return to customary law to deal with a broad spectrum of new and old problems, nor a call for total domination of the environment by Western law. What is desired is a balanced collaboration between both systems.

How then can ongoing collaboration between Western legal agents and Aboriginal communities be achieved? Put another way,

how can coexistence between a responsive Western system and a responsive customary system be achieved?

The reference speaks to integration of the two systems by formalization of custom in the context of Western criminal law or delegation of authority to Aboriginal bodies to mete out justice in their own terms. Yet, we have seen that integration of custom for the purpose of preserving it has the nearly inevitable effect of transforming the meaning of those aspects of the Aboriginal law which have been integrated in ways rarely anticipated by reformers. Further, separation of customary process into custom courts has its own history of failure primarily because the vehicles so established prove too inflexible to deal with new problems and the changing social reality of indigenous peoples. In the American and African experiences, culture courts are also often employed to deny to indigenous people rights afforded all persons under the national legal system. 11/

Should then the reference be pursued?

The reference should be pursued from a different perspective. Both Australian and Aboriginal law should be recognized as capable of functional adaptation. The terms on which that change is directed should be toward the solution of social problems and not toward the preservation of a particular legal approach.

Thus, on the Western side, adaptations of institutions and roles should occur, as they always have occurred, to provide due process of law and to protect rights of citizens in unusual environments. Aboriginal communities are unusual in several respects,

but they are hardly the first new communities to confront Western law. The issue becomes one of appropriate adaptation of Western legal process in order to allow it to function in a manner true to its own ideological prerequisites in an impoverished, small rural community where (1) resident candidates for law positions typical to urban, European settlements are not available, (2) a second legal culture prevails, and (3) where Western law is not entirely trusted as supportive of Aboriginal rights.

Experiments such as the lay assessor project at Pt. Keats should be evaluated, then, not on their cultural integrity but according to their capacity to make sentencing reflect the needs and resources of this Aboriginal community as a component of the larger Australian society.

Customary Law and Legal Development

The role of a customary law process can be viewed from a developmental perspective. It appears that on a world scale, consumers of Western justice systems are asking of modern state systems that they provide either a forum or authentication for dispute processing among citizens, or that they lower the barriers to access and reduce the cost of participation in the official legal process.[12/]

Multi-door courts, as Frank Sanders of Harvard characterizes them, include forums in which personalized and not transactional or bureaucratic disputes (such as debt collection) can be dealt with in lengthy deliberative sessions. Lay persons (e.g., mediators, arbitrators or lay judges) figure in many of these forums. So also do the processes of mediation and arbi-

tration since each is voluntary and neither is bound by either nomative rules of law or evidentiary or procedural requirements of court.

Thus, from a Western perspective, the reference is but one request typical of many to direct modern legal process toward problems and approaches to problems more likely of successful results in small, rural, face-to-face communities.

Further Consideration of the Problem as an Aspect of Planning

Legal planners are concerned with creation and implantation of machinery in developing, non-Western environments and urban neighborhoods, machinery that is appropriate to the cultural preconceptions of local residents as well as the resources of these places. This is often capsulized in Schumacher's credo: Small is beautiful.

This same notion -- that cheap, efficient, practical devices for solving developmental problems are more likely to work and satisfy consumers -- has been carried over from the realm of economic development to the realm of governmental services. Health care, for example, has benefited in many countries by training and deployment of village health aides and in the delivery of other social services.

Western legal history confirms that small, rural places often managed to resolve their legal problems with legal machinery less complex than machinery necessary to urban environments.

What processes and roles, then, may we draw from either Western legal experience or from Aboriginal legal experience which are suitable to the needs of Aboriginal-Australian citizens in their rural settlements?

Western legal history includes active roles by non-professionals as police, judges and corrections officers where professionals are unavailable or inappropriate.[13/] Aboriginal legal history includes documented accounts of clan leaders and councils or clan leaders who deal with deviance by group members.

What reform of the Australian rural justice system implies, then, is continuation of adaptation of Western and Aboriginal laws to new environmental situations. The special challenge confronting Australians and many other societies (including Alaska) is to move from greater bureaucratization, professionalization and complexity to less complicated involvement of rural citizens in the justice process as some balance is struck between professionalism and more simplified (but effective) activity in villages by local residents in the name of the official justice system.

This balance is difficult to achieve because it challenges legal professionals to reconsider their own roles in legal environments and to delegate authority to or share authority with non-professionals.

While difficult to achieve, balanced coordination between professional and local justice systems has proven in Alaska and elsewhere to be the only possible way to achieve a working legal system capable of dealing with serious and less serious problems on a daily basis in ways which respect both state law and customary law.

The mandate of the reference on customary law must be addressed, then, from the standpoint of its impact on problem

solving by both Western legal process and rural Aboriginal constituencies. Formalization of customary process is not, then, an end but a means to an end.

Thus, experiments now underway and ones proposed to Australians by H. C. Coombs[14/] or others must have as their objective rational and successful resolution of social problems by means of the justice process. Field decisions by Western legal officials such as police and judicial experiments explained or rationalized as experiments in integration of custom with law must stand and fall on more than their ritualized or symbolic evocation of Aboriginal custom.

If we recognize as a preliminary matter that Aboriginal customary process will be transformed by integration with Western law, we can no longer justify the end result of such "integration" by arguing that the Western legal decision now is in accord with the inner logic of customary law.

Instead we must consider the impact of this transformed process on daily problems which confront Aboriginals and on Western legal rights due and owing Aboriginals. Further, we should consider the impact of such integration on the ongoing viability of the traditional social organization that sets standards for behavior among members of Aboriginal groups.

While a minority of problems discovered by the Law Reform Commission stem from the operation of the customary law process (e.g., "double punishment") most problems stem from failure of traditional social organization to control behavior of adults

and young people. Clearly then Aboriginal groups must be assisted in reasserting standards of good behavior.

Local Justice and State Justice: The Quest for a Balance in the Northern Territory and Alaska

The Territory and Alaska are legal domains in which, by fits and starts, Western legal officials and members of indigenous cultures have attempted to establish working relationships between state and local law useful to the local and territorial populations. They both encompass immense geographical areas, non-Native laws and Native villages.

In Alaska nearly 200 villages combine both official and unofficial legal activity with official and unofficial state service by police, lawyers, judges and corrections officers. The relationship is sometimes formally arranged, but more usually developed by circumstance and individuals.[15/]

A typical local law arrangement in Alaska until recent years has been a village council (a framework not unlike the Australian missionary council) imposed by Western teachers and missionaries but then filled with Eskimo customary approaches and directed toward Eskimo customary ends.

An early secondary fixture of the council process was an Eskimo policeman, locally hired and fired. He would act as messenger for the council and bring persons before it. He would also contain drunks, chase children home at curfew and shoot dogs when they became a health problem.

The council handled less serious problems by warnings, negotiation, and on occasion by fines and jail sentences in

villages of 300-500 persons.

Serious matters, matters which resulted in injury to victims, were reported to the trooper, stationed in a distant town.[16/]

Thus, intervention by the trooper was keyed to two factors. First, someone would notify him in appropriate cases. Second, he would be capable of an efficient and flexible response. For example, he would sometimes leave the offender in the village to be dealt with by the council.

Where trooper response was reliable and where the trooper consulted with the council upon his arrival, the balance between state law and local law was achieved.

If the council-trooper phase was the first phase of the relationship between Western and local law in Alaska villages, it was followed by a recent period that was, if anything, more complex and that challenged the balance between local and state law.

The Western system became more modern and more independent of the Eskimo village system. Trooper advice expanded, but trooper visits occurred on the volition of troopers and not at council request. Consultation with the council did not necessarily occur. Although a variety of social factors created increasing problems in villages, it was not necessarily the case that the troopers would or could respond when requested.

The further sophistication of the system had other results. Magistrates (or justices of the peace) were appointed in villages to handle minor problems. While they could handle effectively

many problems, ranges of sublegal matters which required lengthy negotiation and deliberation were not handled by magistrates.

Magistrates thus displaced, but did not replace the councils.[17/]

In another realm, offenders who were removed from the villages by the trooper began to reappear shortly thereafter. Release on bail and payment for transportation have left the impression upon Eskimo communities that persons arrested for violence would return before tempers cooled and before the victim had returned from the hospital.[18/]

Comparison With Australia's Northern Territory

As in Alaska, there appears to be a long-term recognition that some collaborative relationship between territorial law and local law is useful and important to everyone.

Yet recent experience with Northern Territorial law would appear to indicate that raising the level of Western activity in settlements can create a situation which weakens rather than strengthens conditions for local and traditional social order.

How can relative improvement of the level of police and magistrate service weaken conditions for social order? The Alaska experience suggests that a failure of balanced collaboration in either the direction of local law or the direction of Western law results in a failure of the legal process as a single working process.

The steps necessary to achieve collaboration depend upon the posture of state law in rural settlements. That posture, in turn, has a great deal to do with very fundamental notions of

governance, notions related to the legal culture of specific, modern nation-states. This is translated into differing levels of governmental presence and direction in small, rural communities.

I have been able to distinguish a marked difference between Commonwealth countries and the states of America in this regard. Although they share a common law heritage, domestic legal relationships with indigenous populations are marked by different conceptions of governmental responsibility for their lives and well-being.

In both Canada and Australia, a sense of tutelage and parental responsibility for "primitive persons" appears to dictate what to American eyes are unusual examples of ongoing governmental presence. For example, Royal Candaian Mounted Police are stationed in <u>every</u> Native settlement in the Northwest Territories. Before the extension of other bureaucracies, these officers represented the government in all fields of endeavor, from mail delivery to child care. Many did not make a single arrest in two years. In Frobisher Bay, a governmental center of about 3,000 persons, nearly 30 fully trained RCMPs policed the town only, providing a remarkable ratio of police to civilians.

Alaska, typical of other American states such as New Mexico and Arizona, provides very limited state police protection to rural persons. Five troopers, for example, serve 57 villages and 29,000 persons in Southwestern Alaska.

The Northern Territory appears to feel impelled to provide

police service in each settlement in a manner not unlike Canada.

The American posture of relative indifference to state responsibility for providing governmental services to all citizens, and the Anglo-Canadian and Anglo-Australian posture of heavy involvement in meeting that responsibility each presents problems when one seeks to define as a working proposition a balanced collaboration between state law and local law.

In Alaska, the most useful balance occurred when troopers were capable of responding to requests for assistance by village councils when serious violence occurred, but incapable (because of the numbers of serious matters from many widely dispersed villages) or disinterested in intervening in each village problem. Room for response to many smaller problems was left to the village council.

This balance broke down for several reasons.

1. The limited resources which the Alaskan Territory (and later state) were prepared to provide did not meet increasing numbers of problems which were serious and, necessarily, state responsibility. These serious problems could not be met by local law. The failure of Alaska to provide sufficient service to deal with serious problems, to meet its share of the collaborative arrangement, removes from local law the reinforcing effect of state law. Local law systems are not equipped to handle all problems (Angell 1979).

2. The balance achieved in Alaska was not developed through a rational plan. It resulted from a fundamental disinterest on

the part of the white majority in providing resources necessary to meet the needs of the Native majority. Ironically, then, attempts to modernize the official justice system are often posited on the notion that state law operates in a vacuum; that local law, especially extra-legal local law, activity is nonexistent.

In Canada and Australia, those who seek to achieve a balance between Western and customary law begin with a situation which requires not the addition of additional Western law resources, but some retreat from the overbearing, uncontrolled and paternal delivery of law services to small communities.

To their credit, both Australian and Canadian officialdom recognize and seek to live up to their responsibility for providing governmental service to persons in all geographic regions. However, their enthusiasm is coupled with a marked lack of respect for the capacity of Aboriginal people to receive and employ this same official authority to resolve fundamental problems of misbehavior for themselves.

The Alaska example suggests that fullscale withdrawal of official legal services would leave the Northern Territory with "the Alaska problem," insufficient supportive state justice services to meet the needs of communities or to reinforce local law systems.

What Australians must find then is some middle-ground. This paper suggests transfer of legal authority over lower echelon decisions to resident Aboriginals coupled with development of optional forums for customary law process.

When Australian officials wonder why customary law is not currently dealing with new social problems, they must understand that customary law systems must be given room to maneuver. They do not need (and should not receive) exclusive authority because social developments in Australia (as in Alaska) have welded together white and indigenous societies. From this, there is no turning back.

Alaska: Why Both Systems Are Needed

As in Australia, economic development and the emergence of towns relatively close to Alaska Native settlements have meant that liquor and economic attractions of the towns began to leave their marks on Native villages.

Villages were incapable of keeping liquor out of town. Problems of liquor use, small and large, increased in many places. Additional police service and police intervention was requested by many villages.

An increasing birthrate in the 1950s and 1960s, the result of dramatic reductions in infant mortality and in tuberculosis by the federal Indian health services, changed the demographic patterns of villages. More than half of the typical Alaska villages are now children.

For many reasons,parental or familial supervision of juveniles has proven to be more difficult. Traditional authority roles were challenged by life in the modern village. Role models, either modern or traditional, were in short supply. Drugs (including petrol sniffing) became problems.

The Alaska juvenile justice process, a subcomponent of the corrections process, was not expanded. It is entirely dependent upon two corrections officers and two paracorrectional aides in rural Alaska. The net result has been that only the extra-legal activity of village councils provides any extra-familial means of social ordering for youngsters.[19/]

The press for modernization and increased activity by police, magistrates and others in rural Alaska came from rural constituencies in three statewide conferences on rural justice in 1971, 1974 and 1976.

However, it has been left to each of the several justice bureaucracies in Alaska to determine the steps to be taken to meet requests for state services.

As participants in the legal process are well aware, the "justice system" has several, often politically and governmentally separate, components. For this reason several different components of the system in Australia and in Alaska will be assessed separately in order to determine how a balance can be achieved in each area and in the relationship between official law and local law taken as a whole.

Police

Although the American tradition emphasizes locally hired and fired police, state troopers have had statewide jurisdiction over what is termed in Alaska the unorganized borough in rural Alaska. Only seven villages on the North Slope of Alaska have united as an organized borough and (using property taxes gener-

ated by oil exploration) have a borough-wide police organization.

The troopers responded to the request for increased state police activity by (1) increasing their capacity to fly to villages when requested (the South Australia model), (2) by hiring as trooper constables Eskimos and non-Eskimos who performed trooper tasks, but who serve in rural areas only (borrowing this concept from the Canadian RCMP), and (3) by training locally hired and paid resident village constables. 20/

Several Alaskan reformers have suggested that small villages be clustered in order to best provide back-up and rotation of village police.

The only example of integration of villages into a subregion has been the North Slope Borough Police Experiment. The North Slope Borough hired non-Natives and developed a regional police network. Two police were placed in each small village as strangers to the villagers. Native police were not hired because of concern about conflicts with relatives (Angell 1977).

The result on the North Slope has been situations not unlike those of settlements in the Northern Territory: overpolicing or misdirected policing and a breakdown in communication between policemen and those they police.

What does the Alaska example offer to the Northern Territory?

First, it appears that the Northern Territory (like the Canadian government in the Northwest Territory) is prepared to allocate two Northern Territorial police and a massive police station to every settlement, this in response to community

requests for persons to deal with drinking grog and petrol sniffing.[21]

In Papunya and other places, the result has been policing that is isolated from and outside of the control of Aboriginal people. Decisions regarding arrests tend to be made after consultation with other Europeans. Competent settlement police cannot control or have removed persons who are less competent police.[22]

Problems of adjustment to settlement life work hardships on European police and their families.

What alternatives to this arrangement exist? First, some form of policing has been requested of the Territory by Aboriginal residents to deal with small problems as small problems.

Control of drunks and young children are two of these problems. However, as in Alaska, it is not necessarily the case that professional police are needed on a daily basis to deal with serious crimes.

As in Alaska, it appears that allocation of policing activity to outside police who have no political obligation to the local population tips the balance between formal and customary justice too far to the side of official response.

With few exceptions,[22a] the nature of settlement police presence in the Northern Territory is <u>entirely different</u> from state police presence in small villages in Alaska. The large police stations, jails and courts constructed in small settlements convey a symbolic message of <u>complete</u> usurpation of the social field by territorial justice.

Australian reformers should consider more carefully how professional police could be made capable of response to serious crime without apparently dominating the entire subject and pushing aside other forms of social control. The "profile" of territorial police must be lowered.

The necessary change seems to be twofold:

1. First, ongoing consultation with settlement councils should become part of the operating procedure of territorial police.

2. Local residents should be hired and trained as settlement police. Their appointment and dismissal should be subject to both the Commissioner of Territorial Police and the Settlement Council. This is an advantage and a disadvantage. Settlement police will be capable of brokering cases between the official legal system (e.g., by notifying territorial police or making an arrest) and customary approaches (by referring cases to traditional forums). This is an advantage.

The advantages of locally hired police would seem to outweigh the disadvantages if we return to our original consideration of problems now confronting Aboriginal communities. Locally hired police can deal with those persons who drink and are violent, but distinguish them from non-violent drinking persons. Locally hired police are aware of familial relationships and can request relevant family members to control juveniles. Locally hired police can distinguish between acts, rationalized as customary in nature, and acts which in fact have a logical tie to custom.

If local hire generates prejudicial decisions by locally hired police, a citizen can complain to outside territorial police. Outside police would still be on call, and, if anything, in a better position to respond to serious deviance than they would be in their present configuration on Native settlements.

Knowledge of the traditional social organization, of individual residents, and a capacity to distinguish among potential defendants are all critical kinds of information and skills which most European police, assigned to the settlements in the earliest phase of their career, are incapable of discovering.

What does reform of the police operation have to do with the customary law reference? The unilateral introduction of a policing operation, suitable to a small European settlement, creates a situation of imbalance between formal and customary law which puts in question <u>any other form</u> of integration of law systems. Customary law is displaced, even though it may not be replaced. However, it is not likely that outside police response only (as in Alaska or South Australia) will be sufficient to deal with daily problems of petrol sniffing and alcohol use. To deal with these problems not readily amenable to customary authority without creating a situation of imbalance which will enfeeble customary alternatives which might be developed, local constables, fixtures of both official and local law, can function with sensitivity to clients, Western law process and customary law process.

Why cannot professional police be trained to be sensitive

to culture? Bicultural education or special courses on anthropology for police have no track record of success. They lead to stereotyping and not development of individual judgment. Training members of a cultural group in Western law while encouraging them at the same time to use and develop their cultural knowledge and personal knowledge of the community has been a successful approach.

Village or settlement police are potentially capable of casting problems in either Western or in customary law terms according to the needs of the situation. They are also more likely to find support from traditional authority groups and to develop lines of communication with citizens.

What of the problems of "Native police?" As with Native courts or custom courts, there is a history of manipulation of such pseudolegal processes and roles to control indigenous groups and to deprive them of rights.

The settlement police or village constables in Alaska are not "Native police." They are Western law figures, members of the smaller and larger legal systems and subject, therefore, to control by both systems. The purpose of creating a balanced collaboration between local law and territorial law is not to remove Aboriginals from the latter system and its rights and responsibilities, but to improve the services available from both processes as each deals with recognized problems.

The Yirrkala mission on the Top End appears to have generated the customary law reference by requesting local police, justices

of the peace and a "monkey cage" for holding defendants.[23] These requests, unanswered over a period of eight years, suggest that Aboriginal people want policing that is sensitive to local problems, but that does not displace other forms of social control.

What then of the police service-aide program?[24] I was able to observe police service-aides and bush trackers and obtain community opinion regarding both. Criticisms abounded. Police aides were often poorly selected. Working as aides to European police, they were given insufficient autonomy and were stigmatized as errand boys. The history of the black bush tracker makes redefinition of the Aboriginal police aide very difficult. Finally, aides have no responsibility to Aboriginal political organizations.

Suppose police reform is left out of the equation when the reference is addressed, what then? After reviewing the rural justice process, I am convinced that police reform is more important than any other change of the present system. The reason for this is that police decide to arrest or not to arrest, or to take persons into custody on protective custody, or to set bail or enforce warrants on estreated bail and on main charges; these decisions,then,dominate and direct the process.

Aboriginal Legal Aide personnel have little or no impact on protective custody. Yet this form of non-arrest, arrest is as frequently used as are arrests on settlements, and far and away the most frequent use of police authority in towns.

Abuse of Protective Custody

The decision to employ protective custody is a subjective police decision regarding the drinking person's endangerment to himself or others. Where this device is employed by police who cannot distinguish one drunken person from another, the numbers of persons who experience protective custody is extreme. In the town of Barrow, in Alaska, non-Native police picked up half of the adults on protective custody in 1977. The figures of pick-ups in Katherine and Alice Springs indicate a similar lack of distinction between persons who are dangerous and those who are merely drinking.[25/]

In short, targeted and limited use of protective custody requires police who are capable of viewing drinking situations as individual situations and not as ethnic situations.

Arrests

In the Territory, virtually all arrests made by police are carried into court and prosecuted by police prosecutors. No screening or dismissals by Crown solicitors direct and guide the police system. A review of court lists from Native settlements in the territory suggests that few crimes by Aboriginals against Aboriginals are prosecuted. Motor vehicle offenses, breaking and entering and assaults against whites, usually police, are prosecuted. Single factual events tend to generate multiple charges.[26/]

Local police can bring to bear the police process against Aboriginals who harm other Aboriginals while drinking.

Bail

At present, territorial police, in absence of local justices of the peace, set bail. Nonappearances are very frequent according to court lists reviewed in Central Australia. Thus, when defendants appear, they are usually serving time on estreated bail.

Local police can set bail which relates to the severity of the offense and the financial situation of the defendant. They may also help assure appearance of defendants in court.

In sum, without a Crown Solicitor to guide the police process at the prosecutorial stage, the arrest process results in multiple charges and high bail, and substantially limits the capacity of other elements of the system to control and check the legal process.

Magistrates and Justices of the Peace

In the Northern Territory, magistrates and attorneys selected from across the nation by the Crown Solicitor ride circuit to outlying settlements and deal with arrests made in those places on a monthly basis.

The territory has managed to recruit many exceptional individuals to magistrate posts and, in so doing, has replaced justices of the peace.

As in the United States, the thrust toward a modern judiciary has caused the territorial system to discard lay or parajudges to improve the quality of justice.

What problems are created by this approach to justice?

1. Although magistrates interviewed are sensitive and desirous of integrating customary matters into the judicial process, they are dependent upon Aboriginals to advise them on customary matters. Their personal contacts with settlements are limited to their official visits.

2. The lion's share of defendants whom magistrates confront plead guilty.

3. The delay in judicial hearings on cases reopens old wounds and allows defendants to disappear on hearing day (at least this is the case in Central Australian settlements).

4. Defendants who do appear, even those who are represented, are passive observers to a foreign process that they do not understand. Interpreters who could provide not only linguistic but substantive explanations of the legal process for defendants and observers are not yet available.[27]

The Alaskan Experience

In Alaska deployment of over 60 magistrates (justices of the peace) in the late 1960s reflected a recognition by the state judiciary that reliable service to these small villages and their neighbors would only occur if local residents provided judicial service.

Lay judges were added to the system with several qualifying restrictions. Defendants could request a hearing by a lawyer-magistrate or judge. Trainees could accept not guilty pleas, but not try these cases. Tapes of arraignment were reviewed by presiding judges in the judicial districts. Lengthy sentences received automatic review by professional judges.

Most important, the court system embarked on an ongoing and ever improving in-house education program for magistrates. It includes lessons-by-mail, visits by a magistrate supervisor (a licensed attorney who holds this job full-time) and training sessions.

In short, it was necessary for the court system to compensate for the parajudges' lack of legal education. What it gained, however, were minority residents in rural villages who were members of the larger legal system, but sensitive to cultural realities of their home villages.

How does this decision to employ parajudges relate to experiments already undertaken in Australia?

Throughout the field trip, I heard about an experiment in Western Australia where Aboriginal justices of the peace (two or more) sat as magistrates. However, information on this experiment available to the Law Reform Commission was insufficient to draw any conclusions.

In the Northern Territory, during the Labor Regime, one or more Aboriginals were appointed as justices of the peace. However, they were not given adequate training and were used only to advise the magistrate at the sentencing phase.

The Lay Assessor Experiments

The use of an Aboriginal justice of the peace in the sentencing phase is but one variant on an ongoing experiment. Magistrate Galvin, Magistrate Pauling and Magistrates Barrette and Towers have each sought community opinion at the disposition phase.[28/] Towers

and Barrette appear to have discussed "what should be done" with Settlement Councils.

Magistrate Galvin introduced magistrate activity with an experiment whereby he met with specially selected clansmen at Pt. Keats at the sentencing phase.[29] The young defendants then had to choose between his sentence and those of the elders.

Magistrate Pauling met with the traditional Garma Council at Yirrkala and prepared to name several members of the councils as justices of the peace until advised that it would undercut traditional authority by H. C. Coombs and Roy Marika.

The use of lay assessors in cross-cultural situations enjoys wide popularity in ex-European colonies and a few other places. I have observed the process at work in Greenland, in Alaska and in American Samoa.

In the early 1970s I recommended to the Alaska Supreme Court that village councils serve as lay assessors at the disposition phase of court hearings in rural Alaska. My argument was that lay assessors could apprise the judge of "social facts" which have as much bearing on sentencing as "legal facts."[30]

However, review of this concept in several locations, including Australia, has left me skeptical of this approach in practice.

The central problem is that magistrates tend to request of lay assessors that they define an appropriate punishment for a Western law violation and draw upon their own resources to implement it.

Thus, in the transcript which Magistrate Towers provided me, the choice offered the youthful defendant was either jail or bush camp.[31/] Yet transcripts indicate a desire by Aboriginals for a broader dialogue.[32/]

Bush camp or punishment camp was removed from its logical place in the traditional initiation process and transformed into a fixture of the Western sentencing process.

In the name of cultural integration, the magistrate appeared to be seeking to compensate for inadequate territorial resources for dealing with troubled youth.

The process of advisement by lay assessors is one fraught with opportunities for manipulation by both maigstrate and lay assessors. Thus, magistrates appear to be bargaining with lay assessors in the transcripts I have read and not entirely prepared to take up the direct suggestion of elders. On the other hand, lay assessors appear to be probing the judicial process and offering up suggestions which may or may not be reflective of custom, but instead ones which it appears the magistrate will favor.

Left outside of this dialogue is the central purpose of such a discussion for any common law judge: to obtain sufficient social data to formulate a sentence which meets the needs of the defendant, the community and the larger society.

I reviewed the Pt. Keats experiment. It appears that the carefully crafted sentences derived from this exercise were incapable of being implemented.[33/]

Thus, it is not the case that mere dialogue with magistrates generates a sense of Aboriginal responsibility for seeing to it that defendants carry out sentences once the magistrate and his legal system have departed.

In short, "Whitefella's law" remains a process separate and apart from Aboriginal responsibility. Further, the magistrates tend to abdicate their responsibility for sentencing without delegating that responsibility to Aboriginals. Finally, the opportunity to obtain useful social information is not taken up by magistrates.

What alternatives are available?

The most obvious alternative is the appointment and training of settlement justices of the peace. These justices of the peace would engage in the sentencing process, subject to checks and balances within the legal system. Only well-trained justices of the peace would engage in guilt-finding and this second activity would be subject to the concurrence of defendants and their solicitors.

What are the advantages?

The local justices of the peace would know the persons in the community. He would be better equipped to make the punishment fit the defendant and the crime. The justice of the peace would be available on a daily basis to react to arrests made in the settlement.

What are the disadvantages?

Training of parajudges requires a substantial commitment of institutional resources. In Australia, law graduates who have not

undertaken clerkships might be used by the presiding magistrate as trainers.

What about local prejudice?

The defendant would be able to ask for a hearing by an outside magistrate. Also, justices of the peace (as in Alaska) would be able to transfer cases which involve relatives or other delicate relationships.

How do local justices of the peace improve the opportunity for integration of custom with Western law? Local justices of the peace may consider the Western legal offense in light of Aboriginal custom. This may mean (as in the case of using offensive language while drunk) that a less serious police offense is treated as a more serious matter. It also may mean that customary matters or relationships may be viewed as ad hoc matters to mitigate the severity of the offense in individual cases.

May Aboriginal Legal Aide solicitors challenge local justices of the peace?

Yes, Aboriginal Legal Aide solicitors may request hearings before professional magistrates. They may also appeal decisions by justices of the peace in the same manner as they would appeal decisions by magistrates.

What other functions would justices of the peace serve?

Justices of the peace could seek the support of family members in juvenile cases. Justices of the peace could also set bail for arrested persons, thus removing that activity from police. The most important function of the justice of the peace, however,

would be his work in connection with both the community and the territorial legal system.

Would not a "custom (or Aboriginal) court" be superior?

I have worked with tribal court judges in the American Southwest and familiarized myself with the Queensland Native Court. My conclusion is that separate Native or custom courts appear to serve neither the ends of custom nor of Western justice. Their connection with Native administrators allows them to become tools of political administrations.

Integration within the territorial system will mean that members of the Aboriginal community will not sacrifice important new legal rights afforded them to cultural separatism.

Corrections and Juvenile law

No component of the Western justice process is more a creature of changing social philosophies and belief than the correctional process. The detachment of moral beliefs and their rationale from criminal law has left the logic of punishment in some disarray among Western practitioners.

Aboriginal persons who view the punishment process from the perspective of their own integrated system of religion and law are shocked by the inability of the Western process to reform behavior of adults and young people.[34/] They offer to the Western process their own sanctions. To a limited extent, Western agents of law seem to adopt Aboriginal punishments out of frustration at the apparent limited utility of institutions and group homes or promises to behave made by Aboriginal defendants.

As both professionals and civilians grapple for a workable solution, be it Western or traditional or innovative, the basic problems of setting in place a framework in which sentences can be made meaningful remains the central issue confronting both the Territorial Legal System and its correctional process.

In Alaska, the increasing juvenile population in the villages and apparent discrimination between Native and non-Native defendants in sentences meted out for non-violent crimes have both pointed to the immense problems which flow from an inoperative corrections system.

Corrections literature deals extensively with community-based corrections as the most successful kind of treatment for youthful offenders. Yet neither the Alaska system nor the Australian system has developed connections with settlements sufficient to make community-based corrections a working reality.

In Alaska, one early experiment which might be considered by Australia was the appointment of paracorrectional aides, men and women who supervised adult and juvenile offenders left in their own or in nearby communities. These persons were on state salary. Of the initial cadre of ten persons appointed and trained, two middle-aged women proved to be the best choices.

In Canada, and informally in Alaska, citizens groups of adults have been made responsible for juveniles by juvenile court judges or police.

In Australia, interviews with officials suggested that use of uncles or clansmen would not work since family loyalties were

greater than loyalties to the legal process. Nonetheless, it appears that family loyalties, basic to Aboriginal social organization, could form the basis for selective appointment of correctional aides in settlements.

A second correctional problem is the failure of the court to inform the corrections bureaucracy or the community as to the exact sentence of defendants. Families should know when defendants are to be released in order to make plans for their return. This kind of communication, long demanded by Eskimo villages, is important when trials are held outside of the settlement to convince communities that "something" in fact has happened to cases arising from the settlements. It is especially important for a community to know conditions of release imposed on adult and juvenile defendants.

Coombs' Suggestions and the Appointment of Justices of the Peace

H. C. Coombs, expert in Aboriginal matters and longtime advocate of legal reform, has suggested that locally appointed justices of the peace would undercut traditional authority.[35/] While younger justices of the peace with special authority would join traditional authority in a new configuration, I do not believe that traditional authority would be as likely to be undermined by this reform as it will be by the presistent intervention of European police and magistrates and their continuing failure to resolve serious problems of drinking and petrol sniffing. Furthermore, the issue is not whether a local justice of the peace or nothing will happen. The issue is whether the Aboriginal com-

munity will have some basis to control and see Western justice occurring within its midst or continue to rely on professional, but ineffective, outside police and magisterial service.

Magistrate Pauling notes that many purely customary matters will be resolved outside of the Western legal process. Other matters are viewed as Western and so are viewed by Aboriginals as suitable for "Whitefella's law." A third category is mixed matters which must be handled with sensitivity to both legal processes.[36/]

Who,then,is most capable of mobilizing the resources of customary and Western law to deal with this third range of matters? To my mind it is Aboriginal persons in Western law jobs who work in conjunction with traditional authorities.

The Burning Spear

The continuing use of spearing as "pay back," a restitutive punishment sometimes applied for breach of Aboriginal law has put in question the very notion that Aboriginal law can be integrated into a modern legal process.

To an outsider this use of the sanction of spearing to denote the "barbarity" of Aboriginal law is as ludicrous as the use of the electric chair, lethal injections or solitary confinement to denote the spirit and totality of Western legal process in the United States. In both cases, there is more to the legal process than this sanction.

The heart of Aboriginal law is considered and lengthy deliberation which serves to draw together Aboriginal familial

authorities and reintegrate offenders into Aboriginal communities and Aboriginal ideology.[37]

If, then, considered deliberation and flexibility is the heart of the process, the issue to be confronted by the Parliament is not whether to legitimize the process of spearing as a Western punishment, but whether the process of deliberation as a complementary process is capable of serving both the Aboriginal settlement and the territorial legal process.

How can council deliberations serve a community and the legal process?

First, an active council reinforced by Western law, can discover matters which may not be law violations in Western terms, but which may become serious law violations if left untreated. Community members may, therefore, intervene before the Western legal process is capable of intervention to deal with misconduct which eventually will come to the attention of police and the courts.

This capacity to discover and treat problems before they become violent was the hallmark of Eskimo village council justice. Although magistrates could replace councils as fining and jailing agents, they could not move to prevent trouble. Magistrates and police do not anticipate trouble.

A second role for councils in a traditional vein has been to deal with the private ramifications of offenses against public order. Councils can arrange for restitution in a variety of ways other than through spearing.

Should councils then be denominated as courts? I suggest not, because councils and courts are different. Each has an important role to play. Council activity can be supported as voluntary activity by creating a framework for mediation or arbitration within which traditional councils might operate without great adaptation of council process to court process.

Would councils then be independent legal authorities? No, the price of formalization would be some conditions imposed by the larger system. Decisions by the council would be subject to review according to the same standards of administrative procedure as are other administrative, non-judicial bodies. This means that their decisions would not be reviewed unless excessive or arbitrary. Participation in council process would be voluntary and not mandatory as in court process.

The Alaska Experience

Whether the site of disputes is an Eskimo village or an urban American neighborhood, planners have learned from legal anthropologists that consensus-seeking bodies are preferable to adversarial forums when they deal with disputes arising from ongoing, face-to-face relationships.

Alaska has had perhaps more experience in an American setting than any other state with the use of mediation in a rural cross-cultural setting as a means to integrate custom and law. Village council process was contained in an officially recognized "problem or conciliation board" in a court experiment of several years' duration.[38/]

During the experiment, it was discovered that both courts and problem boards could operate collaboratively and non-competively in the same village. Each would deal with different problems or with attributes of the same problem.[39]

For example, the problem board in a typical village would deal with A who gave B drinks. B was known to be violent when drunk. The village constable would constrain B when he drank. If B were violent, that incident was dealt with by either the magistrate or village council who fined or jailed B.

It is fair to suggest that customary forums can deal with underlying social problems or disputes between community members which lead to criminal law offenses.

Further Advantages of a Mediation or Arbitration Forum

By wrapping traditional legal process in the mantle of mediation or arbitration, one can avoid recasting the traditional roles and process into Western, common law categories.

The integration of customary law with Western law should avoid changing entirely the traditional approach as a price of formal recognition.

Mediation or arbitration panels need not operate according to common law rules of evidence or procedure. Members of the panel, selected by the community for their wisdom in traditional matters, do not have to be trained as common law judges. Hearings can be conducted in the indigenous language or in English.

Will the forum deal with traditional problems or new problems?

Another reason to integrate traditional process into the summary justice system as an optional forum for mediation or

arbitration is that the panel may be able to study and deal with new problems as well as traditional matters. For example, it may be able to formulate solutions to juvenile problems over a period of time.

Traditional law is thus allowed to remain flexible enough to deal with new situations.

But would not voluntary jurisdiction lead to dismissal of traditional authority?

While the decision to enter into mediation or arbitration would be voluntary as a legal matter, as a practical matter social pressure has proven as effective or more effective than legal pressure to induce participation in problem board proceedings and, further, to induce compliance with decisions reached in that forum.

Does this mean then that Australian process must accept any and all decisions reached in the forum? No, if it chooses, it may order as a price of formalization of custom that physical brutality not figure into decisions reached in this forum. Other forums of restitution (for example, work for victims or payment to victims) could be sanctioned.[40/]

This does not mean, of course, that all forms of physical punishment would be removed from the experience of all traditional settings. It does mean that the Australian process would be freed from the awkward position of validating traditional sanctions that it is not prepared to mete out to both European and Aboriginal defendants.

Who would sit on problem board panels in Aboriginal communitites?

The membership of panels could vary, depending upon the familial relationships of offender and victim. Young or old, literate or non-literate, could sit on this panel. The clans and community could choose members for specific cases.

What then would be the relationship between boards, justices of the peace and police? The relationship and division of problems between internal components of the settlement justice system would depend upon the ongoing relationship between the components and the wishes of members of the community.

Only monitored experiments will discover how components of this new local justice system will interact in specific settlements.

Aboriginal Legal Aide

The Aboriginal Legal Aide organization in Alice Springs and Darwin handles both civil and criminal complaints in the territory. Each is funded by the Department of Aboriginal Affairs and the territorial government. Each employs both solicitors and field officers.

At the summary justice level, solicitors and field officers are innundated with criminal law offenses, offenses often committed by repeat offenders.

In Papunya, for example, 20% of the population has been a client at Aboriginal Legal Aide.[41/]

This substantial involvement with criminal law representation

at sentencing hearings (since nearly all defendants plead guilty) in towns and settlements where magistrates ride circuit drains off nearly all of the resources of legal aide offices. Many other matters in the civil realm are not discovered by either solicitors or field officers.

For example, on our field trip, a field officer from the Alice Springs office discovered that an entire community of Aboriginals was working without pay at a cattlestation run by another Aboriginal. Such matters are serious and are readily discoverable provided that field officers are freed from their onerous duties of chasing after missing defendants.

Attorneys provide summaries to the magistrates in town and settlement courts of background information gathered by field officers. Field officers should be able to present this non-legal information and free solicitors to engage in legal defenses and civil matters.

The Alaska Situation

In Alaska two separate agencies handle criminal and civil matters of Aboriginal people. The state public defender agency takes criminal law matters. Alaska Legal Services handles civil matters.

Both the public defender agency and Alaska Legal Services employ Native paralegals (or field officers) as investigator-interpreters. The most important difference between American agencies and Aboriginal Legal Aid is that field officers receive comprehensive training in Western law as on-the-job training.

This improves the capacity of field officers in America to provide community legal education and to travel to outlying settlements to discover and investigate possible civil complaints.

The second major difference between Aboriginal Legal Aide and Alaska Legal Services is in their funding. The federal government supports Alaska Legal Services and not the state of Alaska. This stems from a recognition that Alaska Legal Services may have reason to bring law suits against either the state of Alaska or the equivalent of the Department of Aboriginal Affairs, the Bureau of Indian Affairs. It would be inappropriate for possible adversaries to design the budget of the legal aid operation.

How does this situation relate to the reference?

Community legal education by persons cognizant of both Western law and Aboriginal customary law should be carried out in Aboriginal communities before conflicts with Western law occur. This means that even in outstations, this form of education could anticipate problems by discussing the way each system works with adults and young people.

The logical persons available to explain Western and customary law are field officers. However, these field officers must be freed from tasks currently imposed by the criminal justice process and they must receive training.

As stated, models for training exist in the United States.

The Parliament should consider direct funding of Aboriginal Legal Aide and a division between criminal law and civil law activities in that operation.

Aboriginal Legal Aide has the opportunity to raise the legal literacy of Aboriginals who are currently experiencing problems resolvable only in a Western legal context.

Justice in the Towns

The in-migration of Aboriginals to either traditional lands or simply to the town and its many attractions suggests that fringe camps are the forerunners of larger official or unofficial settlements.

If this is true, it will mean that rural Australian towns will join third world cities who must deal with problems associated with urban squatter colonies or marginal communities.

The most difficult problem now confronting towns with fringe camps and fringe camps is the development of useful collaboration between fringe camp residents and town dwellers. This collaboration must include discussion of means to limit violence and problems in camps by means of police intervention or by means of resolution of problems by camp dwellers and their councils with the support of the police.

Such working arrangements exist officially or unofficially between police and settlements where I have lived and worked in Brazil.

What has this to do with the reference?

The working relationships necessary to address the needs of fringe camp dwellers are as a practical matter not unlike those which must evolve between territorial police and settlements. In both cases, community members will be looked to in order to handle

many matters and to notify the territorial police when their help is necessary. Mediation panels might be established out of clan groups in urban fringe camps. Auxiliary police might be appointed.

The nub of the problem in town situations is drinking and reaction to drinking by town-based territorial police. Town police jail Aboriginal drinkers repeatedly under the provisions of protective custody. Yet the result is frustrating to both police and Aboriginals.

A good example of collaboration between police and Aboriginals exists in Yirrkala, where Aboriginal leaders bus drinkers back to the community so that they may avoid arrests. Statistics on protective custody in Nhulunbuy are very low when compared with Katherine or Alice Springs.

The Prisoner's Friend

The prisoner's friend, an invention of the supreme court case[42/] on interrogation of Aboriginal (or other foreign) defendants, could be put to valuable use by appointing and training a cadre of persons capable of being called upon as prisoner's friends. This would do much to strengthen relationships between fringe camp dwellers and town law. Prisoner's friends could be trained by the Institute for Aboriginal Development. They should represent the different clans now found in fringe camps.

Legal Education for Aboriginal People

The basis of a working relationship between Aboriginal people and non-Aboriginal sufficient to allow custom and law to interact productively is legal education for young people and

adults. This legal education should deal with real life problems, be they modern or traditional in origin,and treat their solution comparatively by considering the relevance or lack of relevance of both customary law and Western law.

Education which raises the legal literacy of Aboriginals in both legal systems could be accomplished in a variety of ways.

The Alaskan Experience

When Alaskan Indians and Eskimos gathered in a state bush justice conference in 1974, they passed a telling resolution which stated that Native people did not understand the Western justice system and non-Natives did not understand customary law ways.

Lack of real comprehension on both sides is also part of the problem underlying the reference on customary law. Many of the suggestions here, especially the appointment of Aboriginal justices of the peace and police, address this problem by creating in Aboriginal settlements what might be termed legal culture brokers, persons capable of viewing problems in terms of both legal systems and guiding the clients or defendants to the appropriate solution.

A more comprehensive approach has been used in Alaska and on the Navajo reservation where high school texts on customary and Western law have been created by lawyers, teachers and indigenous paralegals and introduced into the school system.[43/]

In territorial Australia, cassettes have already been used to convey information about health and social services. Tapes and textbooks on comparative law should be created as well.

New Legislation for Settlements: Prospects and Peril

The Northern Territory has passed legislation which allows communities to control use of grog within their boundaries and to pass ordinances capable of enforcement to control liquor use.

The problems on settlements regarding liquor and petrol are so serious that a great temptation exists to return to a self-imposed reserve status of yesteryear. Thus, I heard a representative of the liquor control commission urge that when Papunya went "dry" that Europeans be allowed to have liquor permits "or else they would leave."

Along with this reluctance to deal with alcohol use among Aboriginals in terms of abuse, there may well exist a reluctance to get involved in "Whitefella's law." An apparently easier solution would be to let European agents of territorial law handle everything.

This return to the dependent, isolated situation reflective of yesteryear is attractive because it appears that many Aboriginal community members are suffering under the policy changes which officially freed them from non-Aboriginal direction and control. As one observes the new problems, it is easy to long nostalgically for the "good old days" of life on the reserve.

Every effort should be made to avoid this retreat into the past. The current state of Western justice in the Northern Territory suggests that allocation of total responsibility for law and order to non-Aboriginals will not resolve today's settlement problems.

Similarly, if the reference is interpreted as a call for the good old days when there were only traditional problems, capable of customary solution, this approach to law reform will also fail to address today's problems.

The distance between settlements and towns will not increase with the institutionalization of dry policies. Neither will the attraction of younger members of Aboriginal societies for goods and substances which were long denied to Aboriginals. Neither will Western law problems of Aboriginals diminish.

A few communities have begun to make realistic efforts to control liquor use. For example, in Beswick, the council has established a public bar, along with specific drinking hours and quotas for men and women. Drinking at other times and places is prohibited. The result appears to be practical and problem-free.

In Alaska, alternatives to exclusive reliance on police activity to deal with drunken misbehavior are increasing. In Bethel, Alaska, police convey drunks to a treatment center capable of counseling and follow-up instead of transporting persons to jail. The result has been an increased willingness of Eskimo families to call police to remove persons who are drinking and causing trouble. It may well be that treatment will change drinking behavior although it is far too early to draw conclusions in this realm.

Another practical development in rural Alaska has been the emergence of women's shelters. These shelters allow women and children to leave homes where drinking makes daily life difficult

and take some "time out" before returning or seeking new accommodations. Alice Springs appears to have developed such a shelter.

Conclusion

The Reference on Customary Law may lead the uninformed to conclude that what is desired or necessary is a full-scale return to customary law process and a removal from the scene of Western law. Such removal is neither likely to occur nor desired.

W. E. Stanner wrote in a recent article on Aboriginal law,

> [T]he certainty and relentlessness of the process of the criminal law are not resented. What is resented deeply is the arbitrariness, the use of violence, the impatience, and the boorish neglect of Aboriginal rules of conduct and respect for persons and authorities so often shown by the process of our criminal law.[44/]

Stanner noted that, "The 'Aboriginal problem' thus goes beyond the 'retention of their traditional life-style': there is a problem of development as well as a problem of preservation."[45/]

As to the course that development should follow, Stanner remarks:

> I can think of no reason why common misdemeanours should not be disposed of by Aboriginal courts, provided that cruel or unusual or inhumane punishments were not imposed, while felonies were dealt with in terms of and by methods followed in our criminal jurisdiction with the proviso, that, at every stage of proceedings full allowance was made for an Aboriginal viewpoint, motive and sense of responsibility.[46/]

Stanner recognizes that in this realm of law reform, as in so many other facets of Aboriginal life, the choice is not between involvement in Australian life, or in traditional Aboriginal life, but between total involvement and involvement in a society where cultural pluralism is viable. He writes:

> [M]any "Aborigines" will have to make a choice which, in effect, will turn out to be a choice between living

> in a continuing Aboriginal community under a mixed Aboriginal-Australian legal system in all situations involving them with other Aborigines, or living in a non-Aboriginal community under Australian law.[47]

Development, then, of procedures which allow for continued positive involvement of both Aboriginal customary law and Western legal process appears to be the only road to reform of the present situation.

Problems associated with life in rural Australia can be addressed by development of procedures which allow continued positive involvement of customary legal process. Mere inclusion of "traditional" methods in a Western legal process, controlled by non-Aboriginals and foreign to Aboriginal communities will not successfully treat legal problems there. Neither will establishment of separate culture courts.

My recommendations, based on firsthand observation of Greenlandic, Canadian and American justice systems and law systems of Eskimos and American Indians, as well as urban squatters in Brazil, speak to a kind of collaboration by both systems and more direct control of Western justice by Aboriginals in order to benefit both Aboriginals and Europeans.

In Alaska, as in Australia, such proposals have often been met with complaints that "those people" are incapable of assuming such positions. The only effective response to such complaints is to allow "those people" the opportunity to deploy Western legal authority.

In short, we must give Aboriginals the chance to make both legal processes work for them.

FOOTNOTES

*Professor of Justice, University of Alaska; J.D., Columbia Law School, 1968; M.I.A., Columbia School of International Affairs; M.A., Anthropology, University of California, Los Angeles, 1977. Research in Australia was conducted pursuant to a Ford Foundation travel grant. The author wishes to thank the Hon. Mr. Justice M. D. Kirby, Chairman of the Law Reform Commission of Australia, Commissioner Bruce DeBelle, staff member Bryan Keon-Cohen, and ex-staff member Darrell Gunther of the New South Wales Ombudsman's Office for their generous support and cooperation. Special thanks also to Dr. Nancy Williams, Diane Bell, and Marcia Langton of the Institute for Aboriginal Studies, Australian National University; Gloria Brennan, Department of Aboriginal Affairs; and Dr. H. C. Coombs, Centre for Resources and Environmental Studies, Australian National University. The conclusions and recommendations set forth in this report are exclusively those of the author. He alone is responsible for errors of fact, perception or judgment.

1/ Field interviews included police and magistrates in Katherine, Alice Springs and Darwin; solicitors and field officers of Aboriginal Legal Aide in Alice Springs and Darwin; Aboriginal councils and leaders in Papunya, Areyonga, Haast Bluff, Beswick, Banyilli and Yirrkala; fringe camp dwellers at Alice Springs; the Crown Solicitor of the Northern Territory; and community advisors and staff of the Department of Aboriginal Affairs. In addition, attorneys and staff of Aboriginal land councils graciously provided me with permits to visit settle-

ments. Special thanks to Magistrates Towers, Galvin and Pauling for providing background transcripts, memos and access to court lists for Aboriginal settlements and to Pat Miller, Director of Aboriginal Legal Aide, Alice Springs, for providing access to statistical data on population, case loads and court cases. Aboriginals Roy Marika of Yirrkala, Peter Gunner and John Bonson of Aboriginal Legal Aide and Ronda Calma of Nhulunbuy were particularly instructive.

2/ See, e.g., Bruce Debelle and Bryan Keon-Cohen, Field Report No. 3,Aboriginal Customary Law, Northern Territory: Top End (June/July 1978), internal unpublished report of the Law Reform Commission (hereinafter referred to as LRC), and Field Report No. 4,Aboriginal Customary Law, Kimberleys and Part of the Northern Territory (June/July 1978) internal unpublished report of LRC.

3/ Diane Bell provided me with Bell and Pam Ditton, Aboriginal Law: The Old and the New, Aboriginal Women in Central Australia Speak Out (1980, in press).

Nancy Williams is a legal anthropologist who has studied the law ways of Yirrkala mission as they interact with Australian law. Her unpublished dissertation provided perhaps the most useful description of both the internal steps undertaken to redress grievances and the division between "little trouble" and " big trouble" which unofficially divided community legal matters from Australian legal matters. "Northern Territory Aborigines Under Australian Law." Ph.D. dissertation. University of California, Berkeley.

This restricted and unpublished source represents a departure from traditional anthropological descriptions of law and political organizations. The latter treat Aboriginal law as an inflexible whole, isolated from Western law.

4/ See H. C. Coombs, Kulinma, Listening to Aboriginal Australians, Canberra: Australian National University Press, 1978.

5/ See Judges Rules regarding police interrogation of Aboriginal persons, passed down by Justice Foster, Darwin, N. T., 30th April 1976, in Queen and Angus Anunga, Sandy Ajax, Clancy Ajax and Tjingunya (Nos. 58-61 of 1975), and The Queen and Nari Wheeler and Frankie Miller Jagamala (Nos. 207 and 208 of 1975) appended as Appendix 1.

6/ Because I sought to discover the interface between community and territorial law systems, it was important to discover examples of settlements where the police had not already established police posts and begun daily law enforcement. See footnote 22a, infra.

7/ Court lists provide an accurate portrayal of arrest patterns and results of court proceedings. No statistical portrayal of offenses was attempted due to time constraints. Appended as Appendix 2 are representative court lists from Papunya, Yuendumu and Warrabri. Note levels of multiple charges, the limited number of charges stemming from interpersonal violence and levels of adjournments or estreated bail.

8/ Interviews with police prosecutors George Seares and Mark Dalton, May, 1980, Alice Springs, Northern Territory.

9/ Interviews with police, Barry Lampshed, Department of Aboriginal Affairs, June, 1980, Northern Territory.

10/ In Alaska, as in Australia, criminal law violations by indigenous people are explained as being "99% as a result of drinking alcohol."

In a two-year study of the law and alcohol in rural Alaska, the author has concluded that drunken behavior is often viewed as behavior of a second person by Eskimos. The drunk is not held responsible for breaches of customary law because customary law is rooted in rational appreciation of complex codes of etiquette. Thus, from the intoxicated person's perspective, drunken comportment frees him from the difficult responsibilities of customary law and forecloses a reaction by customary legal process.

This may be the reason that in Alaska and Australia indigenous people attempt to restrict the flow of alcohol into communities rather than wait until certain individuals among many are violent when intoxicated.

Although the common law systems in American and in Australia do not officially allow voluntary intoxication as an excuse for criminal law violations, the participants in both systems argue intoxication as a mitigating circumstance:

> that <u>but for</u> the liquor or grog A would not have

acted as he did. Thus, common law practice reinforces traditional perceptions of drinkers.

11/ The classic American work on the historical manipulation of tribal courts and police by agents of the American government is William T. Hagan, Indian Police and Judges: Experimentation in Acculturation and Control. New Haven and London: Yale University Press, 1966.

Bryan Keon-Cohen notes that Queensland Aboriginal courts are most capable of direction by the community manager, and, further, that appeal procedures are directed to the D.A.I.A. District Officer as well as the superior courts. Unpublished field report no. 5, The Cape York Peninsula (and) Queensland, July-August, 1979, LRC, at 37.

The "filtering" or manipulation of the Aboriginal court is not unlike the manipulation of law and order courts on Indian Reservations by Indian Agents in the United States described by Hagan, supra.

As an attorney with direct experience in law practice on American Indian reservations, I view with some alarm the paternal administration and direction of Native courts by professional colonial administrators. The direct involvement of Aboriginal Affairs officers in the legal process of earlier periods, described by the late Chief Justice Kreiwalt in a paper published after his death, has been modified officially. However, one still finds community advisors, often ex-public employees from New Guinea, and ex-DAA employees as employees of the liquor commission, in both cases advising

community councils on matters which include legal redress.

Whether members of the legal system will provide guidance necessary to allow both custom and law evolve, they are clearly in a position to better advise Aboriginals on law that addresses the concerns of all citizens.

One suspects that in the realm of liquor police and court development, present Aboriginal and former Aboriginal affairs officers and members of the police and court establishments are competing for the Aboriginal constituency. Such competition over the direction of Aboriginal communities is an unfortunate by-product of the past.

See M. C. Kriewaldt,"The Application of Criminal Law to the Aborigines of the Northern Territory of Australia," University of Western Australia Law Review, 5:1-50 (1960).

12/ See L. Nader and L. R. Singer, "Dispute Resolution in the Future: What are the Choices?" Unpublished address to the California Bar Association, 1975, and Richard Danzig, "Toward the Creation of a Complementary, Decentralized System of Justice," Stanford Law Review, 26:1-52 (1973).

13/ The heavy dependence upon non-professionals in rural Alaska, a phenomenon more typical of American states than Canada or Australia, is described in Stephen Conn and Art Hippler, "Paralegals in the Bush," UCLA-Alaska Law Review, Vol. 3, No. 1, pp. 85-102 (1973).

14/ H. C. Coombs, Aboriginal Control of Law and Order--Yirrkala, May 28, 1980, unpublished.

15/ S. Conn, "Comparative Analysis of the ABA Standards in Light of Attendant Problems in Bringing Justice Services to Rural Alaska Natives," in W. L. Carpeneti (ed.), Comparative Analysis of Alaska Law, Rules, and Practice, Alaska State Court System, 1974.

16/ S. Conn, Napakiak, Selawik, Gambell, Savoonga, Wainwright and Manokotak, Five Research Monographs on Village Justice System, Alaska State Judicial Council, 1975.

17/ S. Conn and A. Hippler, Traditional Northern Eskimo Law Ways and Their Realtionship to Contemporary Problems of Bush Justice, ISEGR Occasional Paper #10. Fairbanks: Institute of Social, Economic and Government Research, University of Alaska, 1973.

18/ The relevance of preparing a small community for arrival of a convicted person appears to elude participants in modern justice systems. Deviants do not simply disappear into the crowd in small places. It may be necessary for a small community to take steps to repair ruptured relationships in order to allow offender and victim to live together. A process of restitution may be needed to "set things right." Also, conditions of release should be communicated. These often involve restrictions on drinking. Finally, the community may be able to improve the chances of success of a returning offender if it knows that he plans to return. A corrections officer in the NT told me that (1) he did not receive information regarding sentences or release dates of all persons, and (2) that he was barred from releasing this

information to community persons (because a New Zealander had escaped recently with the assistance of outsiders who learned of his release from that department).

19/ S. Conn, Village Life on Trial: Corrections and the Bush. Alaska Bar Association for Bar Association for Improvement of Corrections Program, unpublished, 1976.

20/ My colleague, John Angell, has studied the training of village constables and criticized the program, primarily for its failure to direct training at real-life policing problems. John E. Angell, Alaska Village Police Training: An Assessment and Recommendations. Anchorage, Alaska: Criminal Justice Center, University of Alaska, Anchorage, 1978.

Selection of appropriate candidates for training in the early days created problems. Some villages selected their "problem cases"as trainees in order to reform them. However, in five years the number of reliable village constables has increased.

The most significant problem for villages has become discovering resources to pay the village constable.

21/ Since 1969, two-man police posts have been established at Papunya, Yuendumu, Hooker Creek, Warrabri and Hermannsburg. Papunya and Yuendumu were scheduled to be increased to three-man posts in 1980, and Santa Teresa was scheduled for a post in May, 1980. Since the establishment of a police station in Alice Springs, constables have increased from 34 to 64 men. See letter from J. A. Taylor, Superintendent, Northern Comman, Northern Territorial Police, to Mr. Brian Willis, Director, Central Australia Aboriginal Legal Aide

Service, January 15, 1980, Appendix 3.

22/ Reliable informants spoke of case situations where territorial police who were well equipped to live and work in settlements were paired with police who could not adapt to settlement life and whose decisions actually exacerbated community problems. In one case, even after his wife had witnessed rough handling by his partner, a well adapted policeman was incapable of having his partner replaced. Capacity to remove police who do not do their job well is fundamental to the notion of community control of a law process.

22a/ Once in place in an Aboriginal settlement, the police decisions regarding response, lack of response or mode of response to technical law violations tend to be decisions made by the individual policeman and influenced by his personal perception of the situation and that of his peers. The examples to the contrary occur only where police are geographically separate from the Aboriginal community. At that time one observes that police are notified and intervene selectively with some reference to requests for intervention by Aboriginals. But even these examples of selective police response are unpredictable from the Aboriginal or consumer perspective.

For example, the community of Breswick, a community of about 210 persons, has no police post. The nearest police service is about 29 miles on the track back to Katherine. The police post is staffed by one European policeman and a bush tracker. The police come when called on the radio by the community adviser. He must also respond to requests from a nearby Aboriginal community.

The community adviser brokers or screens requests for police assistance. Thus, he may respond to a request for police assistance by asking that the disputants come before him in attempting to work out some sort of a resolution without calling the police. But in instances where the Council is adamant about requests for police, he invariably notifies the police. The policeman who responds, who has a reputation of being particularly sensitive to Aboriginal communities, does not always make an arrest. He may meet with the persons concerned. He may warn them.

While warning offenders and counseling offenders are so frequent in American policing activities that statistics are kept on this kind of police activity, it does not seem to be as typical a police practice in the Northern Territories. To the contrary, police intervention often results in any number of technical law violations being discovered and pursued in the context of a single incident. The reasons why police activity in this particular example are selective and in some ways controlled, are reasons that relate primarily to the brokering activity undertaken on the part of the community advisers who control the communications to the police, the geographical distance, and the fact that this police post is uniquely equipped with only one professional officer who has many problems to deal with arising out of a second settlement that is much closer and larger, nearer to the police post.

In other words, the factors that create a climate for necessary resolution of local problems outside of the Western system tend to be tied to matters of geography, matters of a limited policing in that particular region that may or may not be changed with the recruitment of additional personnel, the personality of the individual policeman or matters that could change and probably will change with the replacement of the community adviser,with the establishment of a larger police post,and with requests by the settlement for police response to drunken behavior and problems of juveniles when and if they do occur.

23/ Interviews with Roy Marika, Yirrkala; interview with Tom Pauling, former Magistrate, Darwin; review of correspondence from Yirrkala to the Magistrate, Darwin; and review of taped meeting with Garma Council and unnamed supreme court justice (1978), May 29-June 10, NT.

24/ The Northern Territorial Police Aide Program is described in a letter dated December 12, 1979, to Ms. Dianne Bell, Canberra, from R. McAulay, Commissioner of Police, Northern Territory (copy on file with author). The letter indicates trainees will receive a five-day course in police work, to be reinforced at an early date, but a six-week course in Coastal Surveillance (where applicable) to guard against smuggling (page 2). Aides were recruited as Coast Watchers. Commissioner McAullay notes, "Future selection of Aides will be carried out in consultation with local Councils and Community Groups were applicable. However, the character and general suitability of a trainee must be critical

factors" (page 3, McAullay letter).

25/ A statistical report by Alan Gray and Doris Naden to Central Australia Aboriginal Legal Aide offers data on the use of protective custody in relationship to indictable and summary offenses and in relation to race.

See Table 1, Northern Territory Arrests, 1/1/77 to 31/12/78, A. Gray and Doris Naden, "Casework/Clients 1973-79," unpublished (in files of C.A.A.L.A.), September, 1979, Appendix 4.

Alice Springs, a town with approximately 15,000 Europeans and 1,800 full-blood Aboriginals,

shows very great disparities in protective custody arrests when Aboriginals are compared with European offenders:

Alice Springs	15,000 Europeans		1,800 Aboriginals
	353 protective custodies	vs.	6,890 protective custodies

Although records for 1980 were not available, it appears that figures for Aboriginals are about the same. Katherine, a town of 3,000 persons,showed 2,378 pick-ups on protective custody for Aboriginals and 332 pick-ups for Europeans. Katherine police informants said that 1,500 persons had been picked up during the first six months of 1980. Many Aboriginal pick-ups are of persons who come to town to buy grog and do not leave after the bars or liquor stores close. Further, the same person, according to Katherine police, may be picked up on more than one occasion within a 24-hour period.

Fringe camp dwellers I interviewed at Alice Springs indicated that they were picked up as they proceeded peaceably from town to their camps. In Alice Springs only one bar makes Aboriginals welcome. It is located on the edge of town nearest the camps. Dress codes are used to discourage Aboriginals without shoes or shirts from entering many establishments in a manner not unlike the use of codes to discourage "hippies" from entering commercial establishments in the United States in the 1960s.

The absence of monitoring of protective custody arrests gives rise to unverified complaints of excessive force used by arresting and booking officers. On the other hand, however, some supporters of Aboriginal rights are concerned that intoxicated persons will beat their wives. Therefore, they view protective custody "dragnets" as protective of persons who could not call the police.

To meet the needs of Aboriginals and the community, it appears then that better communication between police and civilians would reduce the numbers of person incarcerated while focusing upon people who do in fact cause trouble when drinking. Where cooperation exists as in Nhulunbuy, only 150 persons were taken into custody during the first six months of 1980.

In the territory as a whole, 21,357 Aboriginals were taken into protective custody, while non-Aboriginals comprising at least three times the number of Aboriginals were taken into protective custody 2,434 times during 1977 and 1978.

26/ See chart on legal aide clients from bush courts at Papunya, Yuendumu, Hermannsburg, and Warrabri for court dates from August to December, 1979, in Appendix 5.

27/ Magistrate Towers and other persons interviewed decried the absence of professional interpretation of Aboriginal dialect or Aboriginal English. Australians such as Gloria Brennan see an interpreter as legal culture broker, capable of improving comprehension of both Aborigines and court personnel. See Gloria Brennan, The Need for Interpreting and Translation Services for Australian Aboriginals with Special Reference to the Northern Territory - A Research Report. Canberra: Research Section, Department of Aboriginal Affairs, 1979.

See also, David Nash, Aborigines Before Magistrates, unpublished paper, February 28, 1979, appended to this report as Appendix 6.

28/ See letter from Magistrate Barrette to Magistrate Galvin which outlines his collaboration with the councils of Aboriginal settlements that he visits in Appendix 7. Attorney General Everingham told the Northern Territory Parliament on May 17, 1979, that discussions with the community at this disposition phase (or appointments of justices of the peace to sit with magistrates) were at that time the core proposals for Aboriginal involvement in the Administration of Justice (transcript of debate in file of author, Anchorage, Alaska).

29/ Persons appointed and their clan designation are listed in Appendix 8.

30/ S. Conn, Bush Justice: Sentencing Reforms, A Role for the Council, unpublished draft prepared for the Alaska Supreme Court, 1973.

31/ In response to a councilman who asked whether "there is a special place the kids could be sent like . . . in Darwin," Magistrate Towers replied, "No. No, there are none. The government reckons they are going to build some but they have not done it yet. It is unfortunate. There should be a place like that or you might perhaps board them out or put them in the army for a while or something of that nature, but I cannot do it. I can either let them go or put them in jail, one or the other " Discussion between Yuendumu Aboriginal Council and Mr. W. P. J. Towers, SM; transcript of proceedings at Yuendumu, March 29, 1979.

32/ See, In the Matter of The Hermannsburg Aboriginal Council, dialogue between Magistrate Towers and the Council, August 16, 1978, appended as Appendix 9.

Much of the tension over performance of Aboriginal law and Western law is conveyed in this discussion. For example, these comments by Mr. Pareoultja:

> In our Aboriginal system, it [the law] is getting pretty weak. The white's system is coming over us, so we are fighting together, just like dogs fighting together that you might see - one a german shepherd dog and one just a camp dog, an ordinary dog, and the shepherd dog must be beating him - and this is the system today for the Aboriginal people, especially the young people; they are using this, because we have got no more tribal sort of system.

(On police)

> The local policeman has got a lot of jobs to run around all over the place, only the policeman is not our father - our father and our relatives should control us. That is all right; that is on our side - on the Aboriginal's side.

(On the impact of white law on Aboriginal law and young people)

> Old men used to be the boss one day - in the Aboriginal laws . . [The young man) used to listen, but now, in these days, we can't change it because there is nobody up and nobody down, we are all just level. We just have the white man's law. So we don't know which way to carry on at this stage. We might come back to the Aboriginal laws - it might be that we come up to the white man's law. They are level. (Transcript, pp. 4-5.)

33/ See D. Orr, memo to principal field officer, "Request for Port Keats Court Sitting Follow-Up," unpublished, Appendix 10; and D. Orr, "Report on Field Trip to Port Keats 23.5.79," Appendix 11. From these and other memos it appears that corrections was not called upon to develop a basis in the community to assure that sentences were carried out.

34/ See Hermannsburg transcript, note 32, supra.

35/ Coombs paper, supra, note 14, and interview with Coombs, Canberra, June, 1980.

36/ Interview with ex-magistrate Pauling, Darwin, June, 1980.

37/ Williams dissertation, supra, note 3, at 115.

38/ S. Conn and A. Hippler, Final Report, Emmonak Conciliation Board, A Model for a New Legal Process for Small Villages in Alaska, report to National Science Foundation, unpublished, 1974.

39/ A. Hippler and S. Conn, "The Village Council and Its Offspring: A Reform for Bush Justice," UCLA-Alaska Law Review, Vol. 5, No. 1, pp. 22-57 (1975).

40/ In his parliamentary statement, Mr. Everingham stated that court orders that a defendant be taken into the bush and re-educated were "clearly within the powers of sentencing under the Criminal Law [Conditional Release of Offenders] Act." Transcript, supra, note 28 at 2.

Orders generated from mediation are capable of even broader scope.

41/ See Table 4, Clients of Central Australian-Aboriginal Legal Aide Service by Address and Sex, 1973 to mid-1979, from Gray and Naden, supra, note 25, Appendix 12.

42/ Supra, note 5.

43/ Vicenti, Conn, Jimson, Law of the People, Dine Bibbee Hazaanii, A Bicultural Approach to Legal Education for Navajo Students (4 vols.), Ramah: Ramah Navajo High School, 1972; and Conn, Barthel and McDearmon, Alaska Natives and the Law (7 vols.), Anchorage: Alaska Legal Services, 1977.

44/ W. E. Stanner, "Aboriginal Law" Misunderstood, Canberra newspaper, May 19, 1980, pp. 6, 8.

45/ Ibid.

46/ Ibid.

47. Ibid.

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Note: This bibliography is limited to items cited in the text, but not given full citation in footnotes.

APPENDIX 1

JUDGE'S RULES REGARDING POLICE INTERROGATION OF ABORIGINAL PERSONS.

PASSED DOWN BY JUSTICE FORSTER, DARWIN. N.T. 30TH APRIL 1976.

IN THE SUPREME COURT OF THE

NORTHERN TERRITORY OF AUSTRALIA

NOs. 58 - 61 of 1975

BETWEEN:

THE QUEEN

AND:

ANGUS ANUNGA, SANDY AJAX,
CLANCY AJAX and TJINGUNYA

NOs. 207 and 208 of 1975

BETWEEN:

THE QUEEN

AND:

NARI WHEELER and FRANKIE
MILLER JAGAMALA

1. When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding.

2. When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known to the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.

3. Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand you do not have to answer questions?". Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the Territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

4. Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probitive value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.

5. Even when apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources. Failure to do this, among other things, led to the rejection of confessional records of interview in the cases of Nari Wheeler and Frank Jagamala.

6. Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policeman it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.

7. It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.

8. Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue.

9. When it is necessary to remove clothing for forensic examination, steps must be taken forthwith to supply substitute clothing.

It may be thought by some that these guidelines are unduly paternal and therefore offensive to Aboriginal people. It may be thought by others that they are unduly favourable to Aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police. The guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded.

The Judges of this Court do not consider the effectiveness of police investigation will be set back by compliance with these recommendations. It is basic that persons in custody should be treated with courtesy and patience.

APPENDIX 2

RESULTS OF THE WARRABRI COURT, HELD AT WARRABRI

ON THE 29th OF JANUARY, 1980.

1129/79	Adrian RILEY	Attempted Rape	Committed for Trial
1130/79	" "	B & E with intent	" " "
1139/79	Lenny NELSON	Possess Liquor on Reserve	Withdrawn
1140/79	Jimmy FRIDAY	Possess Liquor on Reserve	Fined $50
1141/79	" "	Aid & Abet Drive Disqualied	Fined $100
1142/79	" "	" " " Drive Unroadworthy	" $25
1143/79	" "	Aid & Abet Drive Disqualied	Withdrawn
1144/79	" "	" " " Drive Unroadworthy	"
1154/79	Simon GREEN	Assault	Sentenced to 7 days H/L
1155/79	" "	Drive Unegistered M/V	Withdrawn
1156/79	" "	Drive Uninsured M/V	Fined $1000
1157/79	" "	Drive whilst Unlicensed	Withdrawn
1158/79	" "	Use threatening words	"
1195/79	Colin Nelson Jagamara	Aggravated Assault	Bail Est & M/W
1198/79	Simon GREEN	Possess Liquor on Reserve	Withdrawn
1214/79	David MBITANA	Assault O.A.B.H	Bail Est & M/W
1215/79	"	Aggravted Assault	" " " "
1216/79	Stephen Bruce WILSON	Drive W/C headlights	Fined $40
1266/79	Grant MORTON	Larceny	Adj to 26.2.80
1268/79	" "	Attempt illegal use M/V	Adj to 26.2.80
1269/79	David SHANNON	Possess Liquor on Reserve	Fined $50
1270/79	David LONG	Possess Liquor on Reserve	B/Est S/C
144/80	David SHANNON	Drive Unregistered M/V	Fined $50
145/80	" "	Drive Uninsured M/V	Fined $1000
146/80	" "	Drive Unregistered M/V	Fined $40
147/80	" "	Drive Uninsured M/V	Fined $1000
148/80	" "	Drive Unregistered M/V	Fined $40
149/80	" "	Drive Uninsured M/V	Fined $1000
150/80	" "	Possess Liquor on Reserve	Fined $50
151/80	" "	Aid & Abet Drive Unregistered M/V	Fined $25
152/80	" "	Aid & Abet Drive Uninsured M/V	Fined $500
153/80	" "	Aid & Abet Drive Unroadworthy M/V	Fined $30
154/80	Dick ROBERTS	D.U.I	Fined $100
155/80	" "	Drive without Licence	Fined $25
156/80	" "	Drive Unregistered M/V	Fined $40
157/80	" "	Drive Uninsured M/V	Fined $1000
158/80	" "	Drive Unroadworthy M/V	Fined $40
159/80	" "	D.W.O.D.C	Withdrawn
160/80	" "	Fail to Stop	Withdrawn
162/80	Vera RANKIN	Disorderly Behaviour	Adj to a Date to be Fixed
163/80	Dansy RANKIN	Disorderly Behaviour	" " " " "
164/80	Geoffrey SHANNON	Aid & Abet Drive Disqualifed	Adj to a Date to be fixed
165/80	Reggie CAMPHOO	Light a Prohibited Fire	Adj 26.2.80 Ex P

CHILDRENS COURT.

1265/79		Attempt Illegal Use M/V	Adj 26.2.80 P/M
1267/79		Larceny	" " "

RESULTS: [illegible], TUESDAY 29th APRIL, 1980.

CHILDREN'S COURT

812/79		Larceny =	Convicted and discharged
1205/79		Attempt illegal use =	Convicted but without proceeding to sentence adj.
1207/79		Larceny	for a period of 12 months upon the Deft. giving security of $100 O/R to be of G.B. for 12 mths
813/79		Larceny =	Under Conditional Release of Offenders Ordinance Deft. is released
C.S.J.			
T/Ck 1199/79	Bruce LIMBIARI	Take liquor on reserve =	On 26.2.80 before JP's J. MENGEL and D. COULSON
1200/79	"	Resist arrest	a M/Warrant and Bail was Estreated. Forms done
1201/79	"	Assault police	at Tennent Creek. Bail $500 O/R 8680
1202/79	"	Escape lawful custody	N/A on 29.4.80
1203/79	"	A.W.O.W.	
1204/79	"	Assault police	
1266/79	Grant MORTON	Larceny =	N/A Adj. 27.5.80 for P/M
1268/79	"	Attempt illegal use	
165/80	Reggie CAMPHOO	Light fire on day of Total Fire Ban =	Fined $400 in default 16 days stay 60 days
443/80	Lenny ALPHONSO	Assault police =	Convicted and imprisoned for 3 months
446/80	"	A.W.O.W. =	Convicted and imprisoned for 3 months concurrent
		FURTHER DIRECTED: Deft to be released after serving 1 mth of such sentence less remissions giving himself security $500 O/R Condition to be of G.B. for 12 months	
440/80	George ALPHONSO	Assault police =	N/A Bail Estreated and M/Warrant to issue
441/80	"	Hinder police	
442/80	"	Armed with Offensive weapon	
487/80	Simon GREEN	Refuse B/A =	Bail Estreated and M/Warrant to issue N/A
488/80	"	D.U.I.	
489/80	"	Drive unregistered	
490/80	"	Drive uninsured	
483/80	Simon GREEN	Disorderly Behaviour =	N/A Bail Estreated and M/Warrant to issue
484/80	"	Resist arrest	
485/80	"	Assault police	
486/80	"	A.W.O.W.	
494/80	Adrian RILEY	A.W.O.W. =	Adj. to A/Springs 12.5.80 P/M Bail to continue
495/80	"	Assault Police	
496/80	"	Hinder Police	
497/80		Illegal use m/v.	
498/80	"	Drive Unlicenced	

506/80	Paul RILEY	Exceed.08 =	Fined $200 in default 8 days stay 2 months Deft licence is suspended for 6 months
507/80	"	Drive Unlicenced =	Fined $50 in default 2 days stay 2 months
508/80	"	Resist arrest =	Withdrawn
509/80	"	Disorderly behaviour =	Withdrawn
499/80	Harrison GREEN	Larceny =	Convicted Cautioned & Discharged No action to taken on bond of 20.2.79
504/80	Jerry RICE	Drive Unlicenced =	Fined $50 in default 2 days stay 3 months
505/80	"	Illegal use m/v =	Fined $450 in default 18 days stay 3 months
501/80	Maxie GUNGARI	D.W.O.D.C =	Withdrawn
502/80	"	D.U.I. =	Fined $75 in default 3 days stay 2 mths Deft's licence is suspended for 6 months
503/80	"	Drive while Unlicenced =	Withdrawn
489/80	Paddy TURNER Jabanunga	Possess liquor on Restricted area =	Fined $500 in default 20 days stay 3 months
500/80	David JOHNSON	Unlawfully on Premises =	Fined $250 in default 10 days stay 2 months
491/80	Grant FOSTER	Disorderly Behaviour =	Fined $50 in default 2 days stay 2 months
492/80	"	D.W.O.D.C. =	Fined $50 in default 2 days stay 2 months
493/80	"	Drive Unlicenced =	Withdrawn
510/80	Normie WILSON	Drive whilst Disqualified=	Remanded in custody for pre-sentence report on 510, 511, 513., 514., 515 to A/Springs 28.5.
511/80	"	Refuse B/A	
512/80	"	Possess Liquor on reserve	516 and 519 - Withdrawn. 520 - Withdrawn.
513/80	"	Assault police	512 - Adj. to A/Springs 28.5.80 for HEARING.
514/80	"	Resist Arrest	517 - Fined $150 in default 6 days no time to
515/80	"	Disorderly behaviour	518 - Fined $150 in default 6 days no time to
516/80	"	A.W.O.W.	
517/80	"	Drive Unregistered m/v	
518/80	"	Drive Uninsured m/v	
519/80	"	Drive unroadworthy m/v	
520/80	"	Assault Police	

APPENDIX 2B

RESULTS PAPUNYA COURT ON 17/4/80.

CHILDREN'S COURT

50/80	Break Enter & Steal - Find sufficient evidence to place defendant upon his trial Adj. to 12/6/80 at Papunya for further hearing part heard. Special Condition Defendant to travel to Brown's bore at earliest possible time and remain there until adjourned date. Background Report required. Bail allowed defendant in sum of $500 O/R. Recognizance of Bail form left at Papunya for defendant to sign as Deft's Council let deft. go before signing his bail.
51/80	Break & Enter with intent - as above.
59/80	Break Enter & Steal - Mesne Warrant to issu
60/80	Break Enter & Steal - K No appearance of Deft. Adj. to 15/5/80 for Plea/Mention at Papunya.
61/80	Break Enter & Steal - No appearance of Deft Adj. to Alice Springs for Plea/Ment. on 13/5/80 (dealt with on other charges at Alice Springs on 10/4/80 - petrol sniffing) Council desires he stays at Utopia Stn.)
62/80	- Break Enter & Steal - No appearance of Deft., at WallaceRock Hole. Adj. to Hermannsburg 14/5/80 for Plea/Mention. Bail to continue.
63/80	Break Enter & Steal - No appearance of Deft Adj. to 15/5/80 a t Papunya for Plea/Ment. Bail to Continue.
64/80	Break Enter & Steal - Adj. to 15/5/80 for Hearing at Papunya Bail to continue.
64/80	Break Enter & Steal - Adj. to 15/5/80 for Hearing at Papunya. Bail to continue.

PAGE TWO
RESULTS OF PAPUNYA COURT ON 17/4/80

SUMMARY JURISDICTION

1033/80	Michael WHEELER	Malic. Damage - No appearance - Bail estreate Mesne Warrant to issue. Police Bail No. 19603 $150.0/
1032/80	Noel WHEELER	Break Enter & Steal - No appearance of defendant. Mesne Warrant to issue. Police Bail No. 19602 $200.0/
1031/80	Dick MARSHALL	Jabinardi - Assault Occasioning actual bodily harm. No appearance of defendant - adj. to 15/5/80 at Papunya for Plea/Mention, Bail to continue.

APPENDIX 2C

RESULTS: PAPUNYA COURT HELD ON
THE 14th FEBRUARY, 1980.

233/79	Kenny BORIS @ BUSH Jambajimba	Attempted Larceny	: ADJ. 22.2.80 to
364/79	" "	Larceny	A/Springs Remand
15/80	" "	B.E. & S.	ed to Gilesbouse
365/79	Reginold Jabaltjari	Larceny	: N/A M/W to issu
366/79	" "	Trespass	
367/79	" "	Larceny	
368/79	" "	Trespass	
369/79	" "	Trespass	
338/79	Jonathon McDONALD	Illegal use m/v	: N/A M/W to issu
362/79	" "	Larceny	
363/79	" "	Trespass	
16/80	Aaron Jabaltjari	B.E. & S.	: ADJ 22.2.80 to
17/80	" "	Trespass	A/Springs Remand
19/80	" "	Trespass	ed to Giles Hous
20/80	Andreas Jagamarra	B.E. & S.	: To reside at Brown's Bore for 6 months
21/80	Andrew Jabinunga	B.E. & S.	: ADJ. 13.3.80 P/M Bail to continue
157/80	Peter Eversley RIGNEY	Aggravated assault:	Without proceedin
158/79	" "	Aggravated assault to a conviction	
159/80	" "	$200 O/R G.B 2 yr and to keep the peace towards Rosina HUNTER	
323/80	Jeffrey REID Jagamara	B.E. & S.	:Convicted & released $500 O/R G.B. 2 yrs Special condition he reside at Giles W.A. for 6 months
416/80	George BENNETT Jabaltjari	B.E. & S.	:Convicted and imprisoned for 12mths, to serve 2mth before eligible for parol
417/80	Evans ANDY Jabaltjari	Illegal use m/v	:Convicted and impri
418/80	" "	Trespass	-oned 3mths each cou
419/80	" "	Malic.damage	Lic. canc for 12mth to be released$500 O/R G.B. 12mths
420/80	Harry DIXON Jungari	B.E. & S.	: N/A Bail Estreated M/W t issue 14400 $200 O/R
421/80	Eric BARGO Jagamarra	B.E. & S.	: N/A Bail Estreated M/W t issue 14399 $200 O/R
422/80	John ANDY Jabaltjari	Unsafe m/v:	$50 stay 7 days
22/80	Tim LEURA Japaltjari	Exceed .08	: File did not go to Pap-
23/80	" "	D.U.l.	unya. ADJ. to A/Springs
24/80	" "	D.W.O.D.C	18/2/80 P/M

RESULTS: COURT HELD AT YUENDUMU ON 27 MARCH 1980

CHILDRENS' COURT

42/80	Interfere with motor vehicle	Convicted. Without proceeding to sentence, Defendant released on bond O.R. $100.00 to be of good behavious for two years
43/80	Unlawfully on premises	
44/80	Malicious damage	

COURT OF SUMMARY JURISDICTION

531/80	Stephen WALKER Jagamara	Interfere with motor vehicle	No appearance. Bail estreated.
532/80	Stephen WALKER Jagamara	Trespass	Mesne warrant to issue
533/80	Garth Jabaltjari SPENCER	Drunk on Reserve	Withdrawn
534/80	Garth Jabaltjari SPENCER	Fight	Fined $50.00 I.D. 2 days
535/80	Johnny Jagamara LONG	Fight	No appearance.
536/80	Johnny Jagamara LONG	Offensive behaviour	Bail estreated - Complaint struck out
537/80	Johnny Jagamara LONG	Drunk on Reserve	
575/78	Ernest BROWN Jabanunga	Break & enter with intent to rape	Adjourned to 1 May 1980 for mention
573/78	Ernest BROWN Jabanunga	Trespass (House 230)	
574/78	-do	Trespass (House 25V)	
539/80	-do	Larceny	Adjourned to 1 May 1980 for sentence
538A/80	-do	Trespass	Pre-sentence report requested
539/80	Ernest BROWN Jabanunga	Break and enter and steal	Withdrawn
809/80	Leonard GRANITIS Jambajimba	Illegal use	Adjourned to 1 May 1980 P/M
810/80	Martin SIMPSON Jungala	Illegal use	Adjourned to 1 May 1980 P/M
811/80	Johnny ROBERTSON Jambajimba	Illegal use	Adjourned to 1 May 1980 P/M
812/80	Richard EGAN Jambajimba	Illegal use	Adjourned to 1 May 1980 P/M
813/80	Clive ROBERTSON Jambajimba	Illegal use	~~Adjourned to 1 May 1980 P/M~~ Bail estreated Mesne Warrant to issue
814/80	Cameron FRANCE	Unroadworthy vehicle	Fined $100.00 I.D. 4 days

APPENDIX 3

NORTHERN TERRITORY POLICE

REGIONAL SUPERINTENDENT
SOUTHERN COMMAND ... STATION
... DIVISION
... DISTRICT

P.O. BOX ... 2630
TELEPHONE ... 522777
REFERENCE

15TH JANUARY 1980

Mr. Brian Mills
Director
C.A.A.L.A.S.
P.O. Box 1670
ALICE SPRINGS, N.T. 5750

Dear Sir,

In reference to [illegible] of this Force since 1972 I submit details that may assist you in drawing up your project.

1. ESTABLISHMENT

Our establishment for the Alice Springs Police Station [illegible] 1 January 1972 was as follows: [illegible] Section, Criminal Investigation Branch, Prosecution and General Duties.

Inspectors	–	1
Sergeant First Class	–	1
Sergeant Second Class	–	4
Sergeant Third Class	–	6
Constable – all grades	–	34
TOTAL	–	[illegible]

[illegible] all [illegible] regional planning since 1972 has been put into effect and is clearly illustrated with our establishment as at 1 January 1980. These figures [illegible] Traffic Section, Criminal Investigation Branch, Prosecution and General Duties. They also allow for in-built relief of 12 members, whereas in the 1972 figures our relief is not shown. This was arranged through our Darwin Headquarters when the need arose.

Assistant Commissioner	–	1
Regional Superintendent	–	1
Inspector	–	1
Sergeant First Class	–	2
Sergeant Second Class	–	3
Sergeant Third Class	–	10
Constable – all grades	–	64
TOTAL	–	82

2. POLICE STATIONS IN ABORIGINAL SETTLEMENTS

The following Police Stations are located in Aboriginal settlements and [illegible]

.../2

Papunya	–	During 1971
Yuendumu	–	4 January 1974
Hooker Creek	–	During 1974
Warrabri	–	18 December 1969
Hermannsburg	–	1 January 1976

Furthermore, Ayers Rock commenced operations on 16 January 1974. This action enabled at least weekly patrols to Docker River, thus taking this [illegible]

Hooker Creek, Warrabri, Hermannsburg and Ayers Rock are manned by two members, [illegible] Papunya and Yuendumu, however [illegible] mid-March 1980, the latter will [illegible] Police Class.

Building has commenced at Santa Teresa and when completed will provide Police presence at that community. On present indications, Santa Teresa should be operational about May 1980.

3. POLICE COURTS AT POLICE STATIONS ON SETTLEMENTS

Actual dates are unavailable in most cases, however the following information has been provided –

Papunya and Yuendumu	–	Regular Court hearings commenced about March 1974. These Courts were presided over by visiting Alice Springs Stipendiary Magistrates for several years and are now on a monthly circuit.
Warrabri	–	The first Magistrates Court was held at this centre on 16 September 1975. This is now conducted regularly on a monthly basis.
Hermannsburg	–	Regular monthly Courts have been conducted since the Police Station commenced operations on 1 January 1976. It is noted, however, that on many occasions prior to this, Courts were held on the settlement when local Aboriginals were concerned.
[illegible]	–	[illegible]ular hearings commenced during 1975 and [illegible] Alice Spring Magistrates presiden[illegible]

4. TWO COURT SYSTEM – ALICE SPRINGS

The two Court system was introduced in Alice Springs on 14 July 1975 following the appointment of Mr. C. CALVIN S.M. as a second Magistrate.

This action meant an increase in our Prosecution Section of one Sergeant which became effective shortly after that date.

Prosecution establishment now provides for –

1 Sergeant Second Class
1 Sergeant Third Class
1 Constable

I trust this information will be of assistance.

Yours faithfully,

J. A. TAYLOR
[illegible]
[illegible]

APPENDIX 4

TABLE I

Northern Territory Arrests 1/1/77 to 31/12/78

	Aboriginal			European		
	Indict-able	Summary	S.33A	Indict-able	Summary	S.33A
Northern Command:						
Darwin	212	486	2,444	934	1,746	1,263
Casuarina	15	161	238	184	1,523	172
Groote Eylandt	478	893	481	6	139	9
Nhulunbuy	115	159	2,162	44	110	72
Other No. 2	177	348	1,317	6	37	58
Katherine	62	238	2,378	66	227	332
Other No. 3	162	232	1,000	14	22	12
Total Northern	1,221	2,517	10,020	1,254	3,804	1,918
Southern Command:						
Alice Springs	210	1,039	6,890	90	473	353
Papunya	7	268	488	-	2	1
Yuendumu	95	218	550	-	3	2
Other No. 2		181	719	1	13	18
Tennant Creek	51	276	1,367	65	181	126
Other No. 3	34	413	1,323	5	29	16
Total Southern	455	2,395	11,337	161	701	516
TOTAL N.T.	1,676	4,912	21,357	1,415	4,505	2,434

APPENDIX 5

BUSH COURTS

Papunya, Yuendumu, Hermannsburg, Warrabri,

Excluding Hooker Creek

No. of People	Charges	Date
H. 7	20	15/8/79
P. 26	49	16/8/79
P. 13	31	13/9/79
Y. 24	62	27/9/79
P. 21	37	11/10/79
P. 27	43	15/11/79
Y. 18	48	29/11/79
H. 22	44	4/12/79
P. 25	41	13/12/79
Tennant Creek		
13	23	7/8/79
14	18	20/8/79
19	26	1/19/79
9	16	15/10/79
2	3	3/12/79
1	2	17/12/79

APPENDIX 6

[Revised 28 February 1979]

ABORIGINES BEFORE MAGISTRATES

David Nash

Between February and August 1976 I sat in the public gallery during a number of sessions of the Court of Summary Jurisdiction at Tennant Creek, Warrabri, and once at Tuendumu, and made particular note of the dealings of Aborigines with this white-dominated institution. Often the the defendants were known to me personally, and significantly affected by the decisons of the Court, so I learnt about cases outside Court as well as in it.

It is a commonplace that the court environment is an intimidating one for those not used to it. Its baffling language and ritual often make it hard to tell if justice is being done, whether Aborigines, migrants, or anglophone Australians are involved.[1] There is, though, no doubt that there has been progress in improving understanding by Aborigines in the Centre of the courts and the European legal set-up, notably through the efforts of officers of the Aboriginal Legal Aid Associations.[2]

However, our courts have to face up to the existence of the competing Aboriginal law, and of the different Aboriginal languages, to name two current blind spots.

language of the courtroom is English stands unquestionned. In the practice I have observed, however, Aboriginal English is usually used by Aborigines in court, and almost never by the others present, and never interpreted. The assumption is, then, that the court understands Aboriginal English perfectly well, and the Aborigine has equal facility in standard and even legal English. (E.g. I once watched a magistrate ask a perplexed young man: "Do you want the matter stood down while you seek counsel?") What is surprising is how much business the court manages to get through. But in situations where misunderstandings often have serious consequences, this assumption is just not good enough. English speakers think they understand Aboriginal English completely because it uses English words, but the words are often used with a different meaning. Liberman [1] has given some examples, to which could be added many more, e.g. the use in Aboriginal English (paralleling a common feature of Australian languages) of hear for both 'hear' and understand', as in "I can hear Warlpiri, but Alyawarra, I can't hear 'im". And there is the case of the term law, which applies more broadly than in standard English to cover 'religious belief, values, etiquette', as well as 'sanctioned social norm'. Another example comes from Francesca Merlan, a linguist who has worked in the Katherine district. The term lie has its English meaning of 'knowingly utter an untruth', but extends to include 'break a promise'. It is easy to imagine how the collapsing of these distinctions leads

Aboriginal law

In the actual cases I know about (as opposed to theoretical discussions of competing jurisdiction), the existence of Aboriginal justice is acknowledged only at the discretion of the Magistrate, and thanks only to the commonsense of the defending lawyer. There is no "due process" to ascertain whether a defendant has been, or will be, tried and punished by his or her community for the alleged offence. There have been cases, of course, where these considerations have been brought out in the Court, and one in particular which provided some sensation for the city press (e.g. The Australian, 19/1/78, p.3). But it seems that if the Magistrate chooses to ignore the Aboriginal processes, and proceeds for instance to a sentence which is effectively the second for the one offence, then there is no legal redress, as the guarantee against double punishment applies only to official punishment recognised by Australian law. It may be precipitate for a layman to suggest that in every case the bench be required to ascertain whether the defendant has been or will be tried in another place, but I propose that as a starting point for discussion of the matter.

Aboriginal speech

The right to an interpreter, for a defendant or witness, is an established one in our courts, and the assumption that the

to misunderstandings in testimony. To make matters worse, the magistrate presumably underestimates the size of the language barrier since the Aborigine before him appears to command a good deal of English.[3]

There would be wide agreement that such a situation warrants a broadly based interpreter service. Such a service entails the operation of a thorough training scheme, whereby qualified people are made familiar with the many heavy demands of interpreting in court: not only the specialized language found there, but such things as the need to faithfully translate meanings without getting too involved in the truth of what is being said. Only now are these schemes being planned (at the Institute for Aboriginal Development in Alice Springs); none are operating, and so there are no professional interpreters yet available for Aborigines.

It should not be thought that a policy decision to support the use of native languages in the courts, allied with a programme of translation and interpreting, will eliminate the problems that stem from language variety. In some situations that approach may be the best choice but it still has flaws. And there are general weaknesses that come to mind.

In a particular community the few trained people available for interpreting a given language may be unsuitable for other reasons, most likely because of an interest in the case. Furthermore, a large number of Aborigines would, I expect, prefer to speak in Aboriginal English in a court. Even if they are

competent in one or more Australian languages, they may feel it is more appropriate to the very European context, of the courtroom and European law, to speak European style, just as they would in a shop or an office. This is an example of the what sociolinguists have termed 'code-switching' -- most often triggered, understandably, by environment or subject-matter.

This leads me to suggest that Aboriginal English should be explicitly recognized by the Court, including the need for it to be interpreted, just as any other language. Trained Aborigines employed for this would have a task extending beyond strict interpreting: as "cultural brokers" they would explain the proceedings of the court to the defendant or witness, as well as report that person's statements to the Court in standard English. It would be best if they were allowed use their discretion as to which utterances are interpreted and speak up only when requested (by any participant) or when they spot a potential misunderstanding. As it happens, this sort of translation has been going on for some time, but outside the Court, and on an ad hoc basis. Here the work of Aboriginal Field Officers of Aboriginal Legal Aid is notable, in their assistance to defending counsel and in explaining court operations and decisions to interested Aborigines. Clearly there is a place for similar, but specialist, work on the prosecution side, as well as defence, and in the court-room itself.

But the language situation in the court-room goes beyond the

clash of different languages. Just as relevant is the disjunction between a European and an Aboriginal style of talking. For instance, an Aborigine will often prefer to use gesture rather than speech not only to refer to some obvious feature of the immediate environment, but also to describe spatial relationships at another location. In the court-room this means that, even more than for a confused European, there is the tendency to indicate objects or individuals non-verbally (and then most likely with the lips rather than the hand); or to appear not to respond to such questions as "Where do you live?" (or, worse, "What is your address?"). And the whole question-answer mode of elicitation is taken to artificial heights in Court, even by legally sophisticated European standards. An Aborigine will often avoid an embarrassing, or rude, inquiry with a simple "Don't know", even to such questions as "Where were you yesterday?" which a European would avoid by other means perhaps more acceptable to the Court. Or an older Aboriginal man is likely to give a straight and detailed answer to someone he believes has the right to ask a question, without thinking how incriminating it might be. Furthermore, politeness and deference is signalled extensively in Aboriginal communities by softness of speech, silence, or averting the gaze -- in the court-room this has been taken as sullenness or stupidity.

And here must be mentioned the ludicrous "offence", quite common in Tennant Creek, of Offensive Language, which illustrates

the immense misunderstandings of differing roles of speech. Countless young Aborigines are perfunctorily arrested, and convicted for shouting conventional swear-words at unflinching policemen with no others present. Not only would those officers often themselves use such words, on and off duty, but the words alleged offensive are repeated poker-face by the prosecutor in full hearing of the public gallery and Court staff, correctly presuming that the language itself is not offensive. It will be a sign of progress when this "offence" no longer appears on those court lists.

Disparate ways of speaking are of course present, albeit to a lesser extent, within the white community, and must be apparent to some degree in courts throughout the country. Coping with them goes beyond any interpreter's job -- but anyone whose profession is in the courts has to be aware of them. When there is also awareness that Aboriginal communities have their own sanctions on their members' behaviour, the relevant legal reform will surely soon follow.

Notes

[1] As has been well described before in these pages: for instance in Ken Liberman's account of "Problems of communication in Western Desert courtrooms", Legal Service Bulletin 85(1978), 94-96, and Tad Sobolewski's plea "Sorry, I don't understand", LSB (April 1978),59-60.

[2] This much has been noted by a recently retired Magistrate (in an interview last June, Centralian Advocate /6/78, Alice Springs Star /6/78).

[3] For a detailed account of Aboriginal English, the reader can do no better than Margaret C. Sharpe's report "The English of Alice Springs Aboriginal Children" (February 1977), available from Traeger Park School, P.O. Box 1621, Alice Springs NT 5750. A more accessible reference may be Chapter 4.1 of R.M.W. Dixon's new book The Languages of Australia, Cambridge University Press, and the references there. See also Basil Sansom's account of Darwin fringe camp speech, e.g. the remarks on witness:

David Nash spent ten months in the Centre studying the Warlmanpa language, and is now completing the linguistics program at the Massachusetts Institute of Technology, Cambridge Mass., U.S.A.

APPENDIX 7

MAGISTRATES' CHAMBERS.
LAW COURTS.
P.O. BOX 1394.
ALICE SPRINGS. N.T. 5750

2nd January, 1980.

Mr. G. P. Galvin,
Chief Stipendiary Magistrate,
P.O. Box 1722,
DARWIN, N.T. 5794

Dear Gerry,

Regarding your letter of the 10th December, 1979, I set out hereunder the position in relation to aboriginal participation in the judicial process on the various settlements I visit as I perceive the position to be.

HERMANNSBURG — Is controlled by a Council of sorts that generally displays, little or no interest in Court proceedings, nor the punishment of offenders. Council members vary considerably from time to time.

PAPUNYA — At times the Council asks to see the visiting Magistrate, and discuss problems of punishment with him. Concern mainly for punishment of persons taking liquor onto area. They have ready access to Magistrate and for local political reasons I doubt if they want this extended.

YUENDUMU — Tribal Council often attend Court and at conclusion of plea, on behalf of the defendant, are called upon by the Magistrate and advise on community attitudes to offender, type of offence etc. Usually advise amount of fine or term of imprisonment appropriate, or if defendant worthy of bond.

HOOKER CREEK — Strong forceful Council who conduct local punishment camp, where offenders are taught traditional crafts under conditions of great privation. Population totally Walbiri and almost totally initiated. Very remote region where normal punishment, gaol, fines, probation or supervised bonds have little application. Present forms of traditional punishment boarder on edge of legality, and I suspect much is illegal by our standards. However, this may not be the case in a traditional aboriginal community where the concept of lawful (parental) correction can reasonably be expected to be given a wide interpretation so as to embrace reasonable lawful (tribal) correction.

2/...

WARRABRI — Consistant Council appearing to be content to have Courts deal with the situation. Fairly settled Community despite considerable variety of tribal groupings.

Overall, I doubt if aborigines are any better placed to apply the law than we are. I expect, were they to become more involved all the centuries of tyrannical or lacka-daisical attitudes experienced under white Justices of the Peace, would merely be repeated.

However, I do believe every facility should be provided to allow the views of aboriginal communities to be clearly and fully communicated to Magistrates and appropriate effect given to such views.

Yours truly,

D.J. BARRITT,
STIPENDIARY MAGISTRATE.

APPENDIX 8

TRIBES

MURINBATA

WADERR (Pt. Keats)
Nym Bundnok, Jumbo Dalla, Berard Jabinee

MURINJABIN THUNGURRAL

PARADA/NGARDIDI
Roy Mullumbuk, Charlie Brinkin, Terence Dumoo

MURINGAIR

YEDERR
Johnny Chula, Bob Puputi

MURINGARR

WUDAPULI (Country Place)
Moses Narjic, Ignatius Tchinburru, Claude Narjic

MURINCURA

KUTCHILL
Walter Wollamun, Berard Jabine

MIRIWING
PJAMUNDANG

KANUNIRRA (Same)
(Close groups)

Country North and South of Moyle River

PLURIN-BETA

WENTER NGANAIYI (Old Mission)
Freddy Cumaigi, Gerard Curwaigi, Charlie Ngumbe

APPENDIX 9

NORTHERN TERRITORY OF AUSTRALIA

In the matter of -

THE HERMANNSBURG ABORIGINAL COUNCIL

TRANSCRIPT OF PROCEEDINGS

BEFORE MR. W.P.J. TOWERS S.M.

AT HERMANNSBURG ON WEDNESDAY, 16 AUGUST 1978, AT 11.20 A.M.

Certified true transcript
of a record produced out of
the custody of the Clerk of
Courts.

P. L[illegible]

H1/1/PMA
Council

16/8/78

HIS WORSHIP: I understand that you gentlemen want to talk to me before I leave today. Is anyone the appointed spokesman for the group?

MR. UNGWANAKA: The drink - it should finish altogether. You see, it is bad for the people.. They are drunk. It is no good.

HIS WORSHIP: Well, you are worried about the drinking problem on the mission, is that it?

MR. UNGWANAKA: Yes, it is no good.

HIS WORSHIP: What is it particularly that you want to say to me about the drinking problem? Is there something you want me to do about it?

MR. UNGWANAKA: People are always in a bad way - and that fellow he can be punished. You see, like olden type used to be, and you used to put them in the gaol. Don't let them have beer. That spoils people. People who drink and drink all the time - they are only just plain bad. I think a good thing if people give them more warning to make people a little frightened of the drink.

A long time ago, it was different altogether. Everybody was frightened of the policeman. Nobody would drink.

HIS WORSHIP: I think you used the word "banish". I have got no power to banish anyone from here, you know that. I cannot send anyone away from here. The only thing I can do is send them to gaol.

MR. UNGWANAKA: That is all. That is what I am talking about.

HIS WORSHIP: You want them sent to gaol?

MR. UNGWANAKA: Not sending people away from the country, no. If anyone that does wrong, then he can be punished.

HIS WORSHIP: What punishment do you suggest? Do you think that the punishment at the moment is not hard enough? Do you think that the punishment is too soft? Too easy?

MR. UNGWANAKA: Yes, that would be the thing. If people were given two or three months, or four or five months, they will be frightened.

HIS WORSHIP: That is a very difficult thing to do, to send people to gaol just because they are drunk. I appreciate that they cause you a lot of trouble, and that they break property and take property and cause a lot of problems - I appreciate that - but if I sent them to

gaol just because they were drunk, they would go up to the big court and they would let them out of gaol again.

MR. UNGWANAKA: That wouldn't be - - -

HIS WORSHIP: I sympathise with your problems, but as I understand what you are asking me to do, is that everyone that gets drunk and comes onto your land here, that you want them sent to gaol. Is that right?

MR. UNGWANAKA: Yes, anyone that is making a noise, he has got to be punished somehow, because if people let them go all the time then they go on too much - it is too easy - it is no good. If people were put in gaol for just two or three days -

HIS WORSHIP: What sort of time do you think they ought to be sent to gaol for?

MR. UNGWANAKA: I would send them to gaol for two or three weeks.

HIS WORSHIP: Two or three weeks?

MR. UNGWANAKA: If they do it again when they come back, put them in gaol properly then. Let them stop in the gaol properly. Next time, they will be frightened.

HIS WORSHIP: Will they? What about the young people that get drunk and make a noise?

MR. UNGWANAKA: Any sort of people.

HIS WORSHIP: Anyone?

MR. UNGWANAKA: It doesn't matter if they are young people, or anybody.

HIS WORSHIP: One of the troubles about sending young people to gaol, is that while they are in gaol, they learn a lot of bad things, and they come out of gaol and they are much worse than when they went in. Sometimes they come out and they make more noise than they ever did before they went in, because they learn bad things in gaol.

MR. UNGWANAKA: Well, so when people are in the gaol, that maybe helps more - learn them more? Because I never been in gaol in me life and me an old man now.

HIS WORSHIP: Unfortunately, it is true that if you send young people into gaol, they meet very bad people in there and they learn very bad things from them, and they are much worse people when they come out than they were when they went in. This happens a lot of the time.

MR. UNGWANAKA: I didn't know all that.

HIS WORSHIP: Because they are in there with very bad people that teach them to do very bad things - much worse things than they go in there for.

What I was thinking about, and I would like to see what you people think about it, is that these fellows that get drunk and make a noise and cause trouble, put them to work cleaning up around the place - make them work and make them clean up and that might make them ashamed to be seen working around the place. Do you think that would help your position?

People that behave badly, make them go to the police station every day, and the police will then put them to work, cleaning up the whole area - cleaning up all the land - picking up all the rubbish, and the papers and the bottles and the cartons and all the other rubbish that is lying around the place, and that would give them something to do. It would keep them out of trouble, and it might make them very ashamed when the rest of their people see that they have been put to work for being bad. Do you think that might help in any way?

MR. UNGWANAKA: We would have to have a policeman to come around outside, all the time. Do you think it would be all right that way?

HIS WORSHIP: The policeman would put them to work every morning and make sure that they did the work that he told them they had to do for that day, and I would probably make them do that for a week, or two weeks or some such time.

MR. UNGWANAKA: I am not living here - I have got my place out of here, on a station.

HIS WORSHIP: Yes.

MR. UNGWANAKA: Well, what do you think of a policeman coming around sometime, and not only on the time, but any time at all, as long as he can see how we are getting on? Would that be all right like that?

HIS WORSHIP: I am sorry, I did not understand.

MR. UNGWANAKA: If something happened, well we can tell the police to just take him away and put him in gaol here - - -

HIS WORSHIP: You cannot do it that way. The police would have to bring him to the court first, and then the court would have to order that he be put to work.

MR. [illegible]: That would be all right, yes.

HIS WORSHIP: All I am asking you is: do you think it will work? Would you like to discuss that between you and see if it will work or not? Or would you sooner see them go to gaol? I can send them to gaol for anything up to six months, but that seems to me to be pretty hard and as I say, there are things wrong with sending them to gaol and besides, if I started sending people to gaol for a month, then they would go to the big court and the big court would say: no, you cannot do that, let him out.

MR. PAREROULTJA: Let me say something about this Aboriginal community in Hermannsburg, please. In 1973, we also put a sign "mission boundary", so no liquor could enter into a mission boundary, and we were on the council that day and nobody was with us to keep us about so everyone break in, and that has carried on for nearly - 64, 65, 66, 67, 68 - four years - now we still suffer more and more with our people and with our communities. We want a good law to stop this strong drinking.

In our Aboriginal system, it is getting pretty weak. The white's system is coming over us, so we are fighting together, just like dogs fighting together that you might see - one a german shepherd dog and one just a camp dog, an ordinary dog, and the shepherd dog must be beating him - and this is the system today for the Aboriginal people, especially the young people; they are using this, because we have got no more tribal sort of system.

On the first - a system - the Aboriginal people have been given by the white people - they have given them the wrong system; they should have given them the right system in the first place. Now, everything has turned into wickedness, and that has gone and finished our system, cultures and things like that. That is what we are worried about.

The local policeman has got a lot of jobs to run around all over the place, only the policeman is not our father - our father and our relatives should control us. That is all right; that is on our side - on the Aboriginal's side. But another bloke who is not my relative - this is in the Aboriginal system - he has gone out to my camp and he is making a hell of a noise out there, and I want to sleep because you see I have got a little kid, or I might be asleep, or maybe the old people want to sleep - the old pensioners, they might not sleep well at night - and these young people are going from place to place and yelling around, and fighting

and making a hell of a noise. So you can run up to the police. If you came up to us and say, "Will you please stop this noise." Do you know what he is going to say to you? He will say something to you in bad language and then start a big fight, and then the police rush in and grab the wrong person.

I once been hit a person very badly, in this sort of fight, so he grabbed me by the neck and put me in gaol, and he let this man free. Something is always getting mixed up someway.

We have been talking to our communities, it is going in this ear and coming out of this ear - the sound wouldn't stop in the middle of the brains, it just come out. They are pretty smart young people. They just reckon the old men should all keep quiet. Not like it used to be. Old men used to be the boss one day - in the Aboriginal laws - the old men used to be the big boss. He used to listen, but now, in these days, we can't change it because there is nobody up and nobody down, we are all just level. We just have the white man's law. So we don't know which way to carry on at this stage. We might come back to the Aboriginal laws - it might be that we come up to the white man's law. They are level.

What the community want to do to these people, like the old man was telling you - keeping them in gaol and keeping them there for six months - and maybe they learn some other silly things. All right. What if the community say: all right, this man - he is a young bloke, or he must be 17 or 18, send this bloke into the Army camp so that he might train for something; he might learn something. Same as like some people - not in the mission now, these days, but only just the once, when we had this initiation, we got young people right on our side, in a separate camp. But this time, in Papunya and a few other places, they have got - what do they call that? Oh, I forget his name. They keep this young fellow for maybe six months, maybe for 12 months sometimes, without seeing their parents or without seeing their families - just only the sacred site - and they learn something, the laws, and when they come out, they know something, and they get really get mixed up too. When they come back to the grog, sometimes they get killed, because they break the law, they get killed. Or, there is young people that have been murdered by the grog. But you know nothing about it, you know nothing about it - the white people don't know what is going on. They might say, "Oh, it's just a murder", or it is just from grog, but we know what is going on. He has broken that big law in the first place. So he should be destroyed; he should be killed; so they can kill him with the grog, or some other thing.

I don't know what they call it. It is the stuff - they can kill any Aboriginal people. Same as the white man has got the rifle to kill. It is very dangerous, this one. Most of the time, they just use it with the grog. They drug this man, or they screw his neck, or they stick a knife into him - same thing as happen with the white man's side of things, because they break this law. But we want to see these young people from the mission here, they are still breaking our laws, but which laws are we going to use? The white man's law, or the blackfellow's law? That is what we want to know, so that we can work together. This side - we can help this one, on the white man's law - and this way, we can help them on this side, in the Aboriginal laws - that is the way that they work. So we can control them o.. both sides.

HIS WORSHIP: What way do you want to do it?

MR. PARERROULTJA: It is not very easy, these days. We are with both laws these days - the white mans and the blackfellows - we should bring another one down and another one up, and that would settle it. Say: according, by this white man's law, well, you are free. According, by this blackfellow's law, you are going to be a dead man.

See, if I murder somebody else today, I could be put in gaol for two years with hard labour and on parole, I might come out in 14 months - maybe 12 months time. All right. According to the white man's law, it is finished. But, according to the Aboriginal law, it is still standing - maybe 20 years - maybe 40 years. They will still get him. They will still finish him off. The white man - another magistrate might say: what is going on with this poor man? Oh, he has been murdered by so and so, and this man must stay in gaol because he murdered this bloke, but he doesn't understand that there is another law, and this law can carry on for 12, maybe 40 years, or 50 years. It is a pretty hard law.

HIS WORSHIP: It is a very difficult question and I do not know what the answer to it is, personally. Of course, killing is out of my province. It is not in my jurisdiction. I cannot do anything about anyone who kills anyone. That is for the big court. They decide that kind of thing.

MR. PARERROULTJA: Yes.

HIS WORSHIP: I do not know what the answer to that particular problem is, and there is no good in me discussing it with you. What I am prepared to talk to you about is

this question of liquor which is apparently worrying you.

MR. PARROULTJA: I told you in the first place, we did put a signboard out near the mission boundary, that no liquor was to come into the mission boundary.

HIS WORSHIP: Anyone who brings liquor into the mission boundary can go to gaol for anything up to six months, or can be fined anything up to $100.

MR. PARROULTJA: Yes.

HIS WORSHIP: That is what can happen.

MR. PARROULTJA: But what happens if somebody - say drunken people might cause more trouble and bring more suffering into the communities - are there any laws to put this man away?

HIS WORSHIP: No, not really. You see, one of your people can go into Alice Springs or some other place and get as much liquor inside him - get drunk and come home without bringing liquor onto the reserve - he just comes home when he is drunk. If he makes a lot of noise and makes a nuisance of himself, then the police may catch him, they can charge him with offensive behaviour or disorderly behaviour, something like that. He can go to gaol for that, or he can be fined for that.

I do not know that in most cases, putting people in gaol helps anyone. In fact, I think that very often, particularly with young people, sending them to gaol makes them worse. They come out worse than when they went in.

MR. PARROULTJA: What about some other place of training - if they go to the Army, or - - -?

HIS WORSHIP: There is just not any such thing. You see, there is no place you can send them. I could not order that somebody join the Army - I have not got the power to do it, and there are not any other kinds of places where they could be sent. That is why I made the suggestion to you earlier, that perhaps they can be made to do some work and made to do some useful work and perhaps, when the rest of the community see that they are being made to work, that might make them ashamed and might perhaps stop them from doing things in the future.

What I understand, and I might be wrong about this and you might be able to tell me differently, but I understand that if you shame an Aboriginal person in the eyes of his own people, that that is a

pretty bad punishment for him - he does not like being shamed - he would sooner go to gaol than be shamed in front of his own people. Is that true or untrue?

MR. PAREROULTJA: It is pretty hard to say. It is untrue, you know, because young people, they just don't care - they don't get shamed - they just forget about everything. They have just got to do what they want to do. They just don't care, and because our parents and the community, they are pretty weak in our system like I said earlier - it is pretty weak with the white man's laws and the blackfellows laws.

HIS WORSHIP: You do not think that the young people know what shame is anymore?

MR. PAREROULTJA: Yes. They don't know nothing about what shame is now - they just do what they want to do, because we haven't got any power.

HIS WORSHIP: Unfortunately, there are really only two alternatives for punishment that are available, and that is either fining them - making them pay money - or sending them to gaol.

MR. PAREROULTJA: Really, there is not the trouble with the fine. In the magistrate's court every time, the magistrate say - just let the people go; there is not much point in it; there is nothing to do with it; we will let him go free. Next time, he is going to do more. He will think: oh, this magistrate is a good man as he lets us free every time. That sort of thing is giving us a bit of a worry. You should give them a big punishment for that. I am just not talking about the gaol - it should cost them more, more money, so that next time they might know that they haven't got any more money, and that will make them think. They might think: well, I don't want to drink any more because I've got no money in my pocket. Nobody helping me; nobody giving me money, so I might do the right thing - this is what he might himself.

HIS WORSHIP: What you are saying then, as I understand it, is that the court has not been tough enough? It has been too soft? Is that what you think?

MR. PAREROULTJA: If the police put a statement that this man had been doing such and such a thing and things like that, the magistrate might say: well, forget about it: Oh, that's nothing. Because another bloke would be standing up and talking for that bloke - the legal aid lawyer bloke. We have got him you know, because he

has got more brains than what I have got - - -

HIS WORSHIP: Not necessarily.

MR. PAREROULTJA: And he could tell this, and this, and this, and finish; just finish. We are the people who suffer from this bloke, you know, not the legal aid and not the magistrate, and not the policeman and not the government, but our own people - we are the lot who suffer from our own Aboriginal communities - the young people, the old people. A lot of the old people, they are drinking too. Maybe a few don't drink. I used to be a drinking man; I used to be a proper silly man, but now I have stopped. Liquor is not good health - it is bad health - so I stopped this one for nearly five years now. It cost me trouble. I think that myself, you know. I had a shot in the stomach - a bloke who shot me in the stomach - it wasn't his fault, but later it brought that big trouble - he caused that trouble. We were friends together, but when we had that drink, that is when it caused trouble. I knew that was a bad thing, and I stopped. I can't see these other people - - - I did get shot right here, in Hermannsburg, that day, and people would have seen me and they should have believed that liquor is very bad.

The other thing I want to ask you: what are we going to do with this fellow selling sly grog in the mission here? Even our own Aboriginal people. What is the law going to say? Have they got the right to supply grog around the mission; what we were talking about the other day, when we were in the Land Council about not bringing any grog into the settlement - into an Aboriginal reserve - so I just want to know what we are going to do with our own people by the law; what is the law going to say? Are we going to put a policeman out to wait for him every day and night without a sleep? He is going to drop dead out there: If he has got to stand there day and night, he is going to drop dead out there. So we have got to put the law someway.

You see, I can put this law over there and they are going to break out, because I have got no-one behind. The fellows who drink, they have got somebody backing them up. They have got the legal aid fellow. They have got a friend. The legal aid is going to ask this bloke supplying the grog: who bought this lot? "Oh, so and so." "Oh, he is nothing, don't you worry." We want to see a law brought into this, to help the community. He only gets taken for one man.

HIS WORSHIP: I can only speak for one man, and that is myself, and

I would be pretty tough on anyone that brought liquor to the mission to sell it - to make a profit out of it and to sell it to Aboriginal people and cause trouble. I would personally be quite tough on that. But I am not very tough on an Aboriginal person who brings liquor onto the reserve to drink it himself. What I suppose you are asking me to be is to be more tough on them, because they cause trouble when they get drunk?

MR. PARERROULTJA: Yes.

HIS WORSHIP: As I said before, the difficulty is, of course, that if I impose tough penalties, then that person who gets the tough penalty goes up to the big court and says it is too tough and the big court says yes, it is too tough, let him out of gaol. You see?

MR. PARERROULTJA: Yes.

MR. UNGWAMAKA: You see, we must have somebody to help. People must have help some way. It is a bad thing. I don't like to see a drunk come round to my place; not at all. It makes everybody frightened. It is no good at all. I think we must make a law somehow.

HIS WORSHIP: What you are saying this morning is all being taken down on tape - it is being recorded - and I will have it all typed and I will send it to the government and let them think about what they should do about it.

MR. PARERROULTJA: I think they should stop the supplying of liquor into the Northern Territory - just stop the wine - that is what the government policy should be.

HIS WORSHIP: If that was done, there would be many people that would say that the black people were being discriminated against; they were being treated as not being equal people in not being allowed to have liquor, and this is one of the problems that you face there.

MR. PARERROULTJA: Even white fellows in the Territory, they are going to have the same - they are going to have a drink in the pub and they come out of the pub without the bottles. The government should say: no wine, or no bottles in the Northern Territory. They can drink wine inside the hotel, and then come out without the bottles. How is that? I mean for black and white.

HIS WORSHIP: The same for everyone?

MR. PARERROULTJA: The same for everyone.

HIS WORSHIP: That is not a bad idea, excepting that I do not drink

in pubs, I take mine home and drink it there.

MR. PARERROULTJA: That is the only way we are going to save our people. If we don't save our people, they are all going to be destroyed and no Aboriginal is going to be left in the next 50 or 60 years, they are all going to be finished because of this alcohol.

HIS WORSHIP: Yes, I appreciate that it is a very grave problem, and it is a very difficult one and in fact may well be an impossible one to solve. Personally, I have got no idea what the answer to it is. No idea at all. As I say, I can impose tough penalties but I don't think that is the answer - not the whole answer.

If I could do as you suggest, send the offenders away to a camp for six months or something like that, where they learn something and be put to work, that would be a very good thing, but there are not any such places available, and if there were, I have not got the power to send them there anyway; until the law is changed, that is the way it will be - if the law gets changed, of course, and it may not.

MR. PARERROULTJA: Like this legal aid fellow, they wasted a lot of time with these kind of people, you know. They should have told them the legal thing in the Aboriginal communities, but they wasted a lot of time. The policeman is the same thing. He has wasted a lot of time with the kind of people - somebody might be murdered in Areyonga, and he is going to be really busy with running around, you know? Too busy running around and wasting a lot of time with these kind of people, and he hurries quickly to Areyonga or somewhere around the middle of the road there somewhere, with a bad sort of accident maybe - then he would be wasting his time here. So we want to work this thing the right way, you know. The policeman can do the big things like that, but not these little sort of things - drunken mobs here. I reckon we have got to get some pretty tough laws.

HIS WORSHIP: Yes. Who do you suggest would see that the law was carried out? Your own people? Or do you suggest that the policeman would carry out the law? You see, if you are talking about your own people doing it, that is generally known as a vigilante committee, and that does not always work out.

MR. PARERROULTJA: I reckon I know the laws - - -

HIS WORSHIP: Let us assume that you have got six or eight men that can handle the drunks, what are you going to do with them when you grab them? Where are you going to

put them? What are you going to do with them?

MR. PAREROULTJA: Put them in gaol, just for a day, and then let them go free. Maybe give them good tucker, maybe cigarettes - plenty of cigarettes out there in that little house, and plenty of blankets there for the night, and then the next time they come back again, still give them plenty of tucker and plenty of smokes and plenty of blankets, all the time.

What I am thinking, you know, if we are going to start with our own people, and then the magistrate is going to help us - say, we are going to put the big law for our own people, the hard law: saying you are not supposed to be doing this and not doing that, because you are going to get punished for that - - -

HIS WORSHIP: Would you rather be your own magistrates and you send your own people to whatever punishment you think would you rather be your own magistrate? You be your own magistrates, using the white man's law? The same power as the white man's law? Sending him to gaol and that sort of thing.

MR. PAREROULTJA: We are using this power sometimes, when we have this initiation, and we have this power, just maybe for three months, but they are really frightened of that law; they are frightened, for three weeks. When we have finished from that law, then everybody just plays up again, because we can't do that every day, you know. It is not according to the law.

HIS WORSHIP: Supposing that the government said to you: all right, you be your own magistrate and you can send your own people to gaol under the white man's law - is that what you want? To be your own magistrates, but using the white man's law? Is that right?

MR. PAREROULTJA: Yes.

MR. UNGWANAKA: That's right.

MR. PAREROULTJA: So this will be - we say to the Aboriginal: if you break the white man's law, also you break our own law, so you can be charged with this. The white man's law may be one charge, but the other one must be drunken charge, and another one must be drunken driving, and another one must be - the same law - the bloke may have broken into an office; maybe three, maybe four, some other things. But this is pretty important with the black Aboriginal magistrate. All right, you break our really strong law; you should be

put into gaol - white man's law tell you that you should be put 12 years in gaol, or maybe 20 years in prison; say, the fellow who killed, he wouldn't get out in 20 years time - is that right? - he would be there all the time. So if you break this law, the Aboriginal people used to kill him - finish him off - so everyone used to see and be frightened because it is a pretty strong law. We can't do that, we can't do this; we have got to stick to this one law, and do the right thing; if we do the wrong thing, we are finished - we just cut him off, even if young or old, cut his life off.

You know, white man's law makes it pretty easy now these days. We have still gotthis law, but we can't see it - it is right under your table - you can see the papers laying on the table there on top, but you can't see underneath what it is like. We have got that law pretty strong inside. It is still going today. But it doesn't come in front of everybody - it just goes a separate way.

HIS WORSHIP: But it does not cover people getting drunk and making a nuisance of themselves, does it?

MR. PAREROULTJA: When he drink, and drunken people murder other drunken people, then the Aboriginal law is the one - - -

HIS WORSHIP: But supposing he just gets drunk and makes a nuisance of himself, and breaks in and steals, the Aboriginal law does not worry about that, does it?

MR. PAREROULTJA: It doesn't worry about that.

HIS WORSHIP: That is where you want to bring the white man's law into it?

MR. PAREROULTJA: That is where we want to bring the white man's law into it.

HIS WORSHIP: To cover those things that the Aboriginal law does not cover - doesn't deal with - is that what you want?

You want to use both laws?

MR. PAREROULTJA: We can see both laws standing pretty stronger. You know, the white man's law might be easy - well, you might see that the white man's law is pretty easy, or the Aboriginal law is pretty hard, and which one are you going to take? You might as well bring them into one. Oh well, this law must be the right one, because it is an Aboriginal community, and its law is a hard one - well, take it on this side - - -

HIS WORSHIP: How would you decide who was going to be your Aboriginal magistrate? Would you have an election and vote for him, or what?

MR. PARAROULTJA: Oh, this is not - you have an election, the white man's way. Our regular way is the old Aboriginal old man - you know, the elders, the leaders, they can talk it over and pick out one - whichever one they pick out.

HIS WORSHIP: I see, he would be appointed by the elders?

MR. PARAROULTJA: Yes. Otherwise, if you are going to make an election, all of Australia going to be elected, and the fellow from Darwin going to be magistrate in Alice Springs - - -

HIS WORSHIP: No, no. I am talking about Hermannsburg now. Would the people of Hermannsburg vote for him, or would the elder people just pick him out?

MR. PARAROULTJA: I reckon, according to the Abbriginal laws, it should be the elders, the old people pick this man out.

I do not think the young people and the women - they are not allowed to talk of Aboriginal laws. Only the old people can talk at Aboriginal laws, and then they can pick an Aboriginal magistrate.

HIS WORSHIP: As I said before, I have had this recorded and I will pass it on to the government for their consideration. After all, the government is the body with the say - it says what will happen and what will not happen - and I will certainly pass on to the government what you have had to say about it, and what your thoughts are on the matter.

MR. PARAROULTJA: Yes.

HIS WORSHIP: I will also keep in mind what you have had to say.

Is there anything further you want to say to me?

MR. PARAROULTJA: There is another point: the people living around the out-station, they should obey the law too. My community, the Pararoultja group,- sitting at a place called Arcyonga - six or seven miles - that is pretty close to the (inaudible) and a lot of people come from this mission, they going past there, they steal it - stuff from that place. Maybe people been going up, they just went in and take it away. If there is something they want, a car - a motor car, and they just take it out and take it away, because we are right on the spot there.

or, whenever they come back drunk, they come back to this place and they walk into the place and they get them other fellows drunk - the other people living in that place. I did get a rough time, a few times you know. My father told me: you had better get out of this place. I tried to control him and not to drink, and he told me to get out, and so I did leave the place for six months, and later he wanted me to go back again. This sort of law, that anybody trespasses in someone else's property, I mean if he called into that place without a permit, he should be prosecuted and come before the court.

If he ring up to Hermannsburg to ask a fellow from the out-station - if he is a legal aid lawyer, if he is a land council lawyer, if he is a man from the Department of Aboriginal Affairs, they should let us know - the owner of that block - the bit of the station they have got there. You never know, he might be good white bloke, but you don't know what he has got in the booze, and next moment you might slip out there - say a few miles for a walk or something - and then you go and find he is supplying the liquor, and by the time you get back, everybody is going to be drunk and fighting. What is going on? Oh, one of our white friends came over here and do this - one of our Aboriginal friends. You know, this is the sort of control we want to put in the law. What they think. To save our own people, not only at the mission, but the people living in the out stations too, so that they can control themselves.

HIS WORSHIP: What you are saying is that what you want is a law that will cover all Aboriginal people, no matter where they are, is that right?

MR. PARERULTJA: Yes.

HIS WORSHIP: In the Northern Territory only, of course. Again, I can only say that I will pass on to the government what your thoughts are on the matter and what the government does, in their wisdom, is up to them. I will certainly do that.

I mentioned to you earlier, and I do not know what your thoughts are on it, and I would have to speak to the administration people anyway if we were doing anything about it, but what do you think about getting some of these people that cause trouble around the camp and the mission, to get them to work for punishment - instead of fining them, and instead of sending them to gaol or instead of just letting them go for nothing at all - put them to work for a week or so.

MR. PAREROULTJA: Some of these young people, they come out from the out station and they cause trouble in the mission here, and their parents are living in the out station, and we should use this power to take the young fellow back into his camp, to his parent and his family out in his camp at the out station, and we could use this power at a court, and give him a sentence of six months good behaviour: don't you come to Hermannsburg any more, you stay where you are, where your out station is. You stay there for six months, or maybe three months. Or, if we have been told a really bad thing, then 12 months.

HIS WORSHIP: I can do that; I have got the power to do that. I can put them on a bond for six months, or 12 months, and make it a condition that they don't come back to Hermannsburg.

MR. PAREROULTJA: Yes; he is going to be looked after by all the people living in that area, or maybe his parents, or maybe his council - he is going to

If he comes out here, the council is going to come out from that place, come to the police and say, so and so is missing; we might as well go and look for him - to see where he is. If we find out he is in Hermannsberg here, in this little area, all right, bring him into another court and give him more - say another 12 months. If you put the fellow on a bond, you know, 12 or 14 months on a bond, he won't like it. If he is doing the wrong thing, well, he has got to do that time. They might understand that. They might say: oh, it is pretty hard to do that - I might as well do my time, and when I am free, I can't do that anymore. I might look after myself. You know? That sort of thing. When there is a tough law for the people, they will look after themselves. If it is a little, easy law, well people will say: oh, he is a good magistrate; he is a good legal aid lawyer. Oh, this fellow is a good policeman - he is pretty friendly to me. If the law is tough, the people will be really frightened then.

HIS WORSHIP: I can do that. I can make conditions of bond that people from the out stations don't come into Hermannsburg for a period of time - whether it is three months, or six months, or 12 months or whatever. I can do that. It still has not answered the question I asked you about: what do you think about getting them to clean up around the place?

MR. PAREROULTJA: I did say that is not power with the Aboriginal people.

HIS WORSHIP: It is a power I have got.

MR. PAREROULTJA: It is your power, but you wouldn't be here, staying here all the time - you will be in Alice Springs.

HIS WORSHIP: Oh, yes, but the policeman will make sure that they do what they are told.

MR. PAREROULTJA: I will come to it another way round: if you are going to do that, then the legal aid are going to jump on your back and the policeman's back here - hey, what's going on with that fellow.

HIS WORSHIP: I do not think the legal aid is going to jump in.

MR. PAREROULTJA: The legal aid might work something, you know. He might say: oh, that fellow is being pushed around just like a slave - he shouldn't be doing this - and they report him to the government: oh, this man has got to be sacked - this magistrate must be sacked, he is a bad man. You know? This sort of thing. You have got to think really - - -

HIS WORSHIP: I do not think you need to worry about my position in being sacked for doing it. I want to know what your feelings are: whether it is a good idea, or a bad idea.

MR. PAREROULTJA: On my side, I reckon it is the community should stick with the policeman or to the magistrate, they will be working if we keep together. I mean, if you tell this man to work - do this, do that, do this - and the Aboriginal people might say, oh, this is a good way, so we can work that way.

HIS WORSHIP: Do you think it is a good way, or not?

MR. PAREROULTJA: Yes. If we work this way, then we can work together. After that, he is going to be shamed. He has been picking up all this rubbish and putting his hand into the mud or some other things, and they are going to bring a big shame - they are going to say: oh, when I am finished with my time, well I might as well go out somewhere else and stay away from the trouble. I think that is a good idea.

HIS WORSHIP: As I say, I will have to talk with the administration people about it. They may or may not agree with the idea, but I will have to talk to them about it and see what they think.

Is there anything else you want to say, or does that cover everything?

MR. McKINLAY: If people - there are too many at one camp - and I don't like too many people; a few people would be enough, you see? At my place, where I am living, if anybody come there they help me with the work, perhaps. I don't like some people who just come up and sit down and they make big camp there, I don't know what shall happen - we never know.

MR. PARERROULTJA: I was going to ask you this question: the fellow who does the bad thing with drinking sort of thing, you know? When you want to work this - after you give him the time, or something like that, or before? I reckon if the policeman catch this fellow drunk and he has been doing a lot of silly things, and a lot of damage, he should put this man in gaol in the morning and take this man and do the job - or, it is not on the law?

HIS WORSHIP: It is not the law, I am afraid.

MR. PARERROULTJA: That has got to come - it has to wait for you?

HIS WORSHIP: It will have to wait until I get - - -

MR. PARERROULTJA: He might have done this thing five or six times you will be here in a month's time, is that right? Or every month?

HIS WORSHIP: Yes, every month.

MR. PARERROULTJA: Say the man is going to do it ten or twenty times - the same man?

HIS WORSHIP: There is not very much I can do about that. It is not in the law, and you just cannot do anything if it is not in the law.

MR. PARERROULTJA: After you give him a sentence? If you say: this man is going to have six months hard labour, he is going to do this job during the six months hard labour, or just the one day?

HIS WORSHIP: No, I am thinking in terms of a week, or two weeks, or something like that.

MR. PARERROULTJA: If this policeman and one or two community councillors - - -?

HIS WORSHIP: That is a matter for co-operation between the policeman and the community councillors.

MR. PARERROULTJA: To make sure that this fellow does the right thing.

CONST. McKINLAY: I am quite willing to help them.

MR. PAREROULTJA: The land council law is that taxis are not allowed to supply any grog into the settlement. If he wants to take somebody as a passenger, he has got to take that man without the grog - without the wine.

He is talking about the taxi. If the taxis are bringing the grog - supplying the grog in the mission - then it will be reported to the police, then the police catch that man and put him in gaol, and if he comes in front of the magistrate, he might make it easy, you know? He is worrying about that.

HIS WORSHIP: I said before, and I will say it again now: I can't pre-judge anything, but if somebody is convicted of selling liquor on a mission for profit, then I would - my initial view is that I would be very tough on that - but I can't pre-judge any particular case, because every particular case is different, and each one depends on its own facts, but I think it is a very wrong thing for people to do this: to sell liquor on missions, and particularly for profit, and I take a very serious view of it, and I don't think I would be very soft in that kind of situation.

MR. PAREROULTJA: Also, there is another thing that has been worrying us. People from other places, when they come out to the mission here - say a fellow from Yuendemu, or a fellow from Warrabri, a fellow from Papunya, a fellow from Areyonga - and they are causing trouble here. They have been living here for nearly five or six years - seven years - they are doing a lot of silly things and the people say it is not their country; they are just spoiling it for the people who belong to this country, you know? The traditional people - the countrymen people, you know? - and he does not belong to this place. Can the law move him back out to his own country? What does the law say?

HIS WORSHIP: The law can put him on a bond and make it a condition of the bond that he doesn't stay in this country - that he goes away and does not stay in this part of the country for whatever the length of the bond is. If it is a year, then he is not allowed here for a year, and if it is two years, then he is not allowed here for two years Beyond that, the law can't say you have got to go back to say, Warrabri and stay there forever. The law can't do that. It can only say: you can't come to Hermannsburg for one year, or two years.

MR. PAREROULTJA: According to the Land Rights legislation, they reckon that the Aboriginal people can go into any land - any country.

HIS WORSHIP: Yes.

MR. PARERULTJA: We couldn't fix that one up, because too many were talking that way and this way and they were really mad, and they didn't understand what was going on, because the land belongs to the Aboriginals. But this is another point. The Aboriginal people in the past never went to another man's country. If they broke this law, if they went into another man's country, they used to be killed - finished.

HIS WORSHIP: Well, of course, you can't do that anymore, under the white man's law.

MR. PARERULTJA: Yes, I know. The country is free.

HIS WORSHIP: Yes. As I say, the court can only say that a particular person can't go to Hermannsburg for say 12 months, but he might go to Areyonga and make trouble there, or he might be a Warrabri man and go to Yuendemu and cause trouble there or something. All the court can do is to stop him from coming to Hermannsburg and causing trouble.

MR. PARERULTJA: That is another thing: the fellow living at Areyonga, they come out with a lot of grog from Alice Springs, and they might sell the grog here, or they might give people a drink - their friends, you know - and after that they took off and the police can't catch them, and the troubles going on after they leave.

HIS WORSHIP: I don't know how you stop that. I just don't know the answer.

MR. PARERULTJA: Then the magistrate going to bring this man into the court - he is only the second man, right? I am talking about the first man who gets away, all right?

HIS WORSHIP: Yes.

MR. PARERULTJA: And the second man goes to gaol, but I reckon the magistrate should straighten this first man out - put him into gaol.

HIS WORSHIP: But he doesn't get caught, you see.

MR. PARERULTJA: Yes, but if he gets caught - the police chases him up - the police might ask him: where do you get this drink from? He might say: oh, my Areyonga friends. The policeman might go out there to Areyonga, and he might be at the Areyonga camp and they say: oh, we didn't call you. You have got no right to come into our place. The policeman might say: oh well, forget about it. We might as well put this one - this poor old man; he has been drinking from somebody else

and then he goes to gaol or gets fined.

I want to see, in the court, the magistrate to ask this fellow: where are you from? - the first words - How long have you been living in Hermannsburg? All right, another question: where did you get this drink from? He says, from so and so - from this fellow and this fellow - to find the leader. If we could find the leaders who are causing all the trouble, we are going to be finished, we are going to be right, we are going to be good. If we are going to keep on grabbing all these little ones - - -.

Like the big fellow, he stole 100 billion dollars and this fellow might sted just $100,000. The police are going to catch this fellow, and then they are going to come in front of the magistrate - this poor old fellow, he might get 15 years and this fellow, he is going to go out. He has got more than the little one - the little is going to the big gaol and the other fellow, he is going to get out - just like that.

I reckon we have got to settle these fellows. The next time we have an Aboriginal community council meeting, then we are going to find them. We know who they are - the Aboriginal fellows who are supplying the grog in the mission - and we are going to bring them in front of us, when we have this meeting. The community, our own people's Aborignal meeting: You are going to do this; you are going to stop. You are going to carry on this? The first time we see you do this, we are going to send the police into your house. You are going to ask this policeman for a search warrant? Well, the magistrate is not going to give him a search warrant. The Aboriginal community council - we are not going to write it down on paper, we are going to tell him: All right, we will settle this man. We will just go into his house, bring him out and take him out, and not wait for another magistrate for another four weeks, but straight out into the big court into Alice Springs.

HIS WORSHIP: I don't know whether that can be done, but it is a good idea - but I don't know that you can do it. I don't know that the law would allow you to do it. Still, you can try. Is there anything else?

MR. PAREROULTJA: What we are really worried about is the suffering of our people from these drunken peoples. First they hand out the money - the unemployeds, or their work wages. They come and get grog in the first place; they forget about food for their families - their wives and kids. They drink all that drink, eat up all that money, and then they come back

to their wives and the wife might run away screaming or crying, something like that - he doesn't care for the kids - everyone wakes up from their sleep: what is going on? A bomb must be from Vietnam, or from Uganada - Idi Amin must be dropping a bomb in Hermannsburg - or what is going on? Oh, hell, what is going on? And they say, oh, so and so is drunk. Everybody can't talk to this fellow, he is a drunken man. The woman might run up to the police for a little help and the police give help, and the next day he does that again, and the next time he does it, it gets worse and worse.

HIS WORSHIP: The government gives this money to people who don't work.

MR. PARERULTJA: Yes, I understand that.

HIS WORSHIP: They shouldn't spend it on liquor, but they do, unfortunately, and the kids and the wives go without.

MR. PARERULTJA: Yes, this is another trouble with the men, you know. I fill out my application for the unemployed, for my wife and for my kiddies - I didn't fill it out for myself. Some people are all right - they must be young people, they may be not married, you know. But there is more trouble with the people with the big families.

HIS WORSHIP: Yes.

MR. PARERULTJA: I understand that this has got nothing to do for you, or nothing to do with anybody else - this unemployment is from the government and they like to look after their people, the government should think of something.

HIS WORSHIP: They don't really expect the people that they are giving the money to waste it - they expect them to use it wisely, but they unfortunately don't, and they waste it, and they waste it on liquor, and it causes a lot of trouble, and I don't know what the answer to that one is either. There is not much I can do about it anyway.

Gentlemen, if that is all you have to say to me, thank you very much for coming. It has been very interesting talking to you, and I understand some of your problems a little better than I did before, and as I said earlier, I will pass our discussions on to the authorities, and it is up to them to do something if they think that they should do something. Once again I thank you for coming.

MR. PARERULTJA: Thank you.

1 - 16 - 11

To: PRINCIPAL FIELD OFFICER

Re: REQUEST FOR PORT KEATS COURT SITTING FOLLOW-UP.

Following the first sitting of the Port Keats C.S.J. last Friday, 27 April, the Chief Magistrate, Mr. G. Galvin, requested that follow-up action be taken by a Field Officer from Correctional Services. Mr. Galvin requested he be supplied with a report by Friday, 1 June (prior to his next visit to Port Keats on 5 June). The report should detail what, if any, action had followed Mr. Galvin's decisions in the following matters:

1. Stanislaus NINNAL

2 x Wilful Damage
1 x Armed with Offensive Weapon.
Sentence:
(i) Barred from club for 3 months.
(ii) 1 months bush training with Tribal Elders.
(iii) 10 days unpaid work for community.

2. Peter CAMAYI (CUMAIYI)

Illegal Use
Drive in Manner Dangerous
Drive Unlicensed.
Sentence:
(i) Disqualified from driving 3 months.
(ii) 1 months bush training with Tribal Elders.
(iii) 10 days unpaid work for community.

3. Frank BUNDUK

Malicious Damage.
Sentence:
(i) Barred from club for 3 months.
(ii) 10 days unpaid work for community.

4. Andrew Majindi MAJINDI

B.E.S.
Sentence:
(i) Barred from club for 3 months.
(ii) 1 months bush training with Tribal Elders.

5. Cypiian NGARRI

Drive unregistered and uninsured.
Sentence:
Disqualified from driving for 2 months.

6. Peter NULJULA

Drink Methylated Spirits.
Sentence:
(i) Barred from club for 3 months.
(ii) 10 days unpaid work for community.

7. Angelo KUNGUL

Drink Methylated Spirits.
Sentence:
(i) Barred from club for 3 months.
(ii) 10 days unpaid community work.

All the above offenders have the same (Murinbata) tribal affiliation. The Elders concerned are Felix Bunduk, Bernard Jabinee, Jumbo Dulla and Patrick Nudjula.

The following offenders have the same (Muringair) tribal affiliation. The Elders concerned are Colin Wanja, Jimmy Long, John Numa, Fabian and Terry.

Jude LANTJIN

Drink Methylated Spirits.
Sentence:
(i) Suspended 1 month gaol.
(ii) 10 days unpaid work for community.
(iii) 1 months bush training with Elders.
(iv) Barred from club for 3 months.

Bede Lantjin LANTJIN

Drink Methylated Spirits.
Sentence:
(i) Suspended 1 month gaol.
(ii) 10 days unpaid work for community.
(iii) 1 months bush training with Elders.
(iv) Barred from club for 3 months.

Jeremy WUNJAR.

Drink Methylated Spirits.
Sentence:
(i) Suspended 1 month gaol.
(ii) 10 days unpaid work for community.
(iii) 1 months bush training with Elders.
(iv) Barred from club for 3 months.

Gilbert KURRI

Drink Methylated Spirits.
Sentence:
(i) Suspended 1 month gaol.
(ii) 10 days unpaid work for community.
(iii) 1 months bush training with Elders.
(iv) Barred from club for 3 months.

Virgil WARNIR

Drink Methylated Spirits.
Malicious Damage.
Sentence:

(i) Suspended 1 month gaol.
(ii) 10 days unpaid work for community.
(iii) 14 days suspended gaol cumulative on the months sentence.
(iv) 1 months bush training with Elders.
(v) Banned from club for 3 months.

Bernard Jabinee although of Murinbata affiliation represented both groups in much of the Courtroom discussion between the Elders and the Chief Magistrate and he has accepted the role of our liaison contact.

In making the orders concerning the performance of unpaid work for the community, the Chief Magistrate suggested that the work should be done on the basis of one day per week, the wages for that day going to the "KARDUNUMIDA", which translates as the Committee of Port Keats (the term the Elders prefer to the Council). However, the Chief Magistrate indicated he did not object if the unpaid work was done on more than one day in any one week.

To check out the progress of the Chief Magistrate's orders the following contacts should be made:

1) Catholic Mission authorities for permission to travel to Port Keats and enable accommodation to be arranged,

2) Contact with Port Keats authorities on arrival,

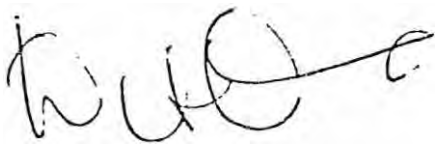
3) Contact with applicable Elders and Bernard Jabinee,

4) Contact with Port Keats office administrative staff re transfer of offenders' wage deducted to the Kardunumida, Port Keats,

5) Visit to club premises to see what steps have been taken to enforce the ban clause on the various offenders, and

6) Contact with the Port Keats Police for their comments on the progress of the orders.

The Chief Magistrate stressed after the Court hearing that the success or otherwise of his attempt at the hearing to involve the whole community in the treatment and sentencing of offenders depended greatly on the follow-up that ensued. He would expect a Field Officer's report prior to his next visit to Port Keats on 5 June.



D. Orr.

1 May 1979

APPENDIX 11

To: DEPUTY DIRECTOR (FIELD)

Through: PRINCIPAL FIELD OFFICER

Re: REPORT ON FIELD TRIP TO PORT KEATS 23.5.79
(NOW KNOWN AS WARDERR)

Purpose of Field Trip

At request of Director, follow up sentences handed down by Mr. G. Galvin, C.S.M. at first sitting of Port Keats Court held on 27 April 1979. Investigate and report on current situation.

General

Following instructions to proceed to Warderr for an investigation and report for the Chief Magistrate as above, arrangements were made for me to visit the area on 17 May. These arrangements were made after being assured that the Aboriginal acting as a liaison person between the various tribal elders, the Court and Correctional Services, would be available for interview.

After advice on the afternoon of 16 May that the liaison person would not be available for interview on 17 May as he was out bush but would be available the following week, arrangements were then made to visit Warderr on 23 May. Usual courtesy advice was given to Catholic Mission Headquarters and permission to visit was granted. A request was made to the O-I-C at the police Public Relations Unit, for Port Keats police assistance and co-operation.

Before leaving for Warderr on 23 May I was informed that the Aboriginal liaison person would not be available for interview as he was still out bush. He would be in Darwin on Thursday, 24 May, however, I was told. Under the circumstances I considered it desirable to proceed with my visit on 23 May as planned. I intended to:

(i) question various persons about the effectiveness or otherwise of the orders banning certain offenders from attending the evening sessions at the Club at Warderr.

(ii) question Mission administrative staff about the effectiveness or otherwise of the orders requiring the provision of free work to the community by some offenders.

(iii) investigate the situation generally in respect to those orders requiring certain offenders to attend bush camps with tribal Elders.

On arrival at Warderr I was met by a Mission Brother who informed me that because of a set of events involving alleged larceny of community funds by a former employee at Port Keats Mission he was unavoidably committed to long discussions that day with various investigating officers. Neither he nor his staff had the time to fully discuss the work orders made by the Chief Magistrate. The Brother assured me, however, that some, not all, of the offenders had had pay deducted from them and this had been transferred to the Kardunumida (as previously reported, the Aboriginals preferred name for "Council"). The Brother said those who had not had any pay deducted had not been in any employment since the date of the Court hearing on 27 April. My understanding of the Brother's next remarks were that arrangements were being made to provide some employment for <u>these</u> offenders so that the Chief Magistrates's orders could be followed.

The Brother, though quite courteous, was obviously busy and our conversation was of a very rushed and limited nature. As he is the advisor to the Kardunumida, this was unfortunate.

Enquiries were then made at the Police Station. Both the two regular policemen there were absent, one on a brief holiday and the other attending as a witness at an Alice Springs Court. The relieving constable was shown a copy of my previous report to you detailing the offenders, and the orders made against them. The constable, obviously not au fait with the offenders named, was not able to provide me with much information. However, he did advise that one of the Brothers acted in the capacity of Supervisor at the Club each night, and excluded people barred from the Club, including those 10 ordered by the Court at the 27 April sitting.

Following this information I spoke to the Brother concerned who verified the constable's comments. The orders debarring the offenders were being adhered to, said the Brother. There had been one incident of one offender attempting to break the Chief Magistrate's order but the Brother had thwarted the attempt. The Brother added he did not particularly like the authoritarian supervisor's role at the Club. At this stage, however, he did not consider the Aboriginals themselves would be able to police the court orders concerning Club attendance.

No Aboriginal Elders were available for discussion about the effectiveness, or otherwise, of the Chief Magistrate's orders.

On making enquiries re the Aboriginal liaison person, I was told he would not be in Darwin on Thursday 24 May but would be arriving next week to attend East Arm Hospital for a hand operation. He is expected to be in Darwin for some days. Subject to his agreement I propose to interview him should you agree during his stay in Darwin.

It is recommended that a copy of this report be given to the Chief Magistrate prior to his planned visit to Warderr soon.

It is further recommended another field trip be made to Warderr in 3/4 weeks time.

D. Orr
FIELD OFFICER

25 May 1979

APPENDIX 12

TABLE 4

Clients of the Central Australian Aboriginal Legal Aid Service, by Address and Sex, 1973 to Mid-1979

Address	Number of Clients (a) Males	Females	Persons (b)	Percent	Client/ Population Rate (c)	Multiple-Case Clients (d) Persons	Percent of Clients (e)
Alice Springs	550	190	750	17	7.3	250	34
Hermannsburg*	360	10	370	8	9.5	120	32
Lajamanu*	220	70	290	6	8.2	50	17
Papunya*	450	70	520	12	20.0	130	25
Tennant Creek	160	40	190	4	9.7	40	19
Warrabri*	740	10	250	6	9.6	140	57
Yuendumu*	260		260	6	5.7	140	55
Central)nei Australian)(f)	660	130	790	18	1.7	140	18
Other Places	170	70	240	5	0.2	10	5
Not Stated	540	280	820	18	n.a.	50	6
Total (b)	3,610	880	4,490	100		1,080	24

nei - not elsewhere included. n.a. - not applicable.

(a) Figures in this table refer to clients, not cases. That is, a client that was represented by the CAALAS more than once was counted only on the first occasion.

(b) If a column or a row does not add up to the total shown, it is because the figures have been rounded off to the nearest ten.

(c) Number of clients as a percentage of population per annum. Population figures were derived from 1976 census results for the Aboriginal population.

(d) Clients who were represented by the CAALAS more than once.

(e) Multiple-case clients as a percentage of total clients with each address.

(f) No other locality turned up frequently enough to be shown separately.

* These are the only Aboriginal communities in Central Australia with a police station.